Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Department of Interior; ADA E. DEER, Assistant Secretary of the Department of Interior for Indian Affairs; JOHN D. LESHY, Solicitor, Department of the Interior,

and

JOHN KITZHABER, Governor of the State of Oregon; STATE OF OREGON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a federal statute, 25 U.S.C. § 2719(b)(1)(A), which requires the Governor of a State to enact or administer a federal scheme under the Indian Gaming Regulatory Act to regulate a proposed gaming establishment on newly acquired trust land, violate dual sovereignty principles of the United States Constitution?

II. Has Congress unconstitutionally diminished the power of the Executive Branch to execute the laws of the United States by giving the Governor of a State the power to veto an administrative determination of a Federal Officer made pursuant to standards established by Congress in § 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A)?

III. Is a federal statute, 25 U.S.C. § 2719(b)(1)(A), which requires the Governor of a State to concur in the Secretary of Interior's legislatively established determination that a proposed Indian gaming establishment is in the best interest of the tribe and is not detrimental to the surrounding community, contingent legislation, and if so, is Congress' delegation of this federal policy decision to a state official unconstitutional?

IV. Is a federal statute, 25 U.S.C. § 2719(b)(1)(A), which requires the Governor of a State to concur in the Secretary of Interior's determination that a proposed Indian gaming establishment is in the best interest of the Indian tribe and its members and is not detrimental to the

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surrounding community, where no state law authority authorizes the Governor to make such a determination, an exercise of state authority, and if so, is such congressional delegation unconstitutional?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe"), respectfully petitions for a writ of certiorari to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 13, 1997.

OPINIONS BELOW

The Order and Amended Opinion of the Ninth Circuit Court of Appeals is reported at 110 F.3d 688 and is reproduced in the Appendix filed herewith. App. 1-29. The Amended Opinion and Order of the United States District Court for the District of Oregon is reported at 841 F. Supp. 1479 (D. Or. 1994), and is reproduced in the Appendix filed herewith. App. 30-57.

STATEMENT OF JURISDICTION

The Court of Appeals entered its amended order and denied petitioner's petition for rehearing on June 13, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to separation of powers principles and dual sovereignty principles which are not set out in any specific provision of the United States Constitution, the

relevant provisions of the Constitution are set forth below:

Art. I, § 8, cl. 3:

> To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes;

Art. II, § 2, cl. 2:

> He shall have Power, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not otherwise provided for, and which shall be established by Law. . . .

Art. IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The pertinent statutory section of the Indian Gaming Regulatory Act involved in this petition is set forth below:

25 U.S.C. § 2719. Gaming on lands acquired after October 17, 1988.

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired in trust for the benefit of an Indian tribe after October 17, 1988. . . .

(b) Exceptions

(1) Subsection (a) of this section will not apply when –

(A) The Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination;

STATEMENT OF THE CASE

In March 1992, the Siletz Tribe approached the Siletz Agency of the Bureau of Indian Affairs (BIA) with a proposal to take land into trust for the purpose of establishing a casino under the Indian Gaming Regulatory Act (IGRA). The sixteen-acre proposed site was located in

Salem, Oregon, approximately fifty miles from the Siletz Tribe's reservation, but within the Tribe's historical territory. The Siletz Agency, pursuant to federal regulations, requested comments on the Tribe's proposal from local governments. On April 20, 1992, Governor Barbara Roberts of Oregon submitted a consultation report to the Secretary of Interior, Manuel Lujan, objecting to the Siletz Tribe's proposal.

The Siletz Tribe submitted a formal fee-to-trust application to the Siletz BIA Agency in June 1992 for use of the property for gaming under IGRA. The BIA again solicited comments from the State, local governments and Indian tribes. The Siletz Agency recommended approval of the Tribe's proposal in July 1992, pursuant to federal regulations, and forwarded the proposal to the next administrative level, the Portland Area Office of the Bureau of Indian Affairs. After review, the Portland Area Office recommended approval and forwarded the proposal to the Central Office of the BIA, where final approval of such fee-to-trust requests occur. The Central Office returned the fee-to-trust application to the Portland Area Office in September 1992 for supplementation.

The Siletz BIA Agency, pursuant to 25 U.S.C. § 2719(b)(1)(A), then requested consultation from local governments, the Governor, and local tribes on whether the Tribe's proposal met the requirements of the statute. Comments were submitted by these and other interested entities and persons. In October 1992 the Governor submitted written comments directly to the Assistant Secretary for Indian Affairs in the Department of Interior, Dr. Eddie Brown, asserting that the Tribe's proposal would be detrimental to the surrounding community.

The Portland Area Office again recommended approval and forwarded the Siletz Tribe's fee-to-trust application to the BIA Central Office. On November 6, 1992, the Secretary of Interior issued findings and a determination pursuant to 25 U.S.C. § 2719(b)(1)(A) that the proposal was in the best interest of the Siletz Tribe and its members, and would not be detrimental to the surrounding community. In his findings, the Secretary responded to comments submitted by the county, city, State, and local Indian tribes, and concluded that their concerns were not supported by available evidence.

Pursuant to 25 U.S.C. § 2719(b)(1)(A), the Secretary of Interior then asked Governor Barbara Roberts to concur in his determination in favor of the Siletz Tribe. The Governor submitted a written statement refusing to concur. On December 21, 1992, the Secretary denied the Siletz Tribe's fee-to-trust application on the advice of the Solicitor to the Department, Thomas Sansonetti, who had advised the Secretary that the fee-to-trust transfer for gaming purposes could not be granted without the Governor's concurrence.

This statement of facts is taken from the District Court opinion, *Confederated Tribes of Siletz Indians of Oregon v. United States*, 841 F. Supp. 1479, 1482-3 (D.Or. 1994). App. 34-35. The Siletz Tribe appealed the Secretary's denial to the District Court. The State of Oregon and the Governor intervened. The Tribe claimed federal jurisdiction under 5 U.S.C. § 706; 28 U.S.C. § 1331; 28 U.S.C. § 1346; 28 U.S.C. § 1362; and 28 U.S.C. § 2412. The Tribe alleged in part that it was unconstitutional under the Appointments Clause of the United States Constitution and under general separation of powers principles to give

the Governor of a State the authority to veto the administrative determination of a Federal Officer. The Tribe sought severance of the offending phrase of 25 U.S.C. § 2719(b)(1)(A) giving the Governor concurrence authority.

The District Court agreed with the Tribe, and ruled that it was unconstitutional to allow the Governor to veto the Secretary's determination under Section 20 of IGRA. However, despite the presence of a severance clause in IGRA, 25 U.S.C. § 2721, the court agreed with the State and severed the entire subsection of the statute rather than just the offending provision.

The parties cross-appealed to the Court of Appeals. The Ninth Circuit reversed the District Court, finding that § 2719(b)(1)(A) was contingent legislation requiring the joint approval of the Secretary of the Interior and the Governor to become effective, rather than a gubernatorial veto of a federal administrative determination. The court held that Congress had delegated limited legislative authority to the Governor and to the Secretary under the statute. The court also held that the Appointments Clause was not violated by the gubernatorial concurrence authority in § 20 because the Governor was not exercising substantial federal authority under the statute and because her activity under IGRA was episodic in nature.

REASONS FOR GRANTING THE WRIT

This case implicates a broad spectrum of separation of powers and related constitutional jurisprudence,

including the Appointments Clause, nondelegation doctrine, dual sovereignty principles, interference with the authority of coordinate Branches, contingent legislation, necessity for judicial review, and the Tenth Amendment. Section 20 of the Indian Gaming Regulatory Act and the Ninth Circuit Court of Appeals' ruling on its constitutionality presents an opportunity to reconcile and integrate these principles.

1. The Ninth Circuit's Decision Is Inconsistent With *Printz v. United States*, And Raises Dual Sovereignty Constitutional Issues In The Context Of Another Constitutional Clause.

In its last term, the Court addressed the constitutionality of a federal statute which required a state officer to participate in a federal regulatory program. In *Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365 (1997), the Court held that Federal Government directives to State officers to administer or enforce a federal regulatory program "are fundamentally incompatible with our constitutional system of dual sovereignty." ___ U.S. at ___, 117 S. Ct. at 2384. The Siletz Tribe's petition presents a substantial dual sovereignty constitutional question.

The Federal Government in *Printz* pointed to a number of recent federal statutes beside the statute at issue in that case – the Brady Handgun Act – which purportedly required the participation of state or local officials in implementing federal regulatory schemes, as evidence that the Brady Act was constitutional. The Court rejected this argument, citing *INS v. Chadha*, 462 U.S. 919 (1983), which held a statute incorporating the legislative

veto unconstitutional despite the existence of hundreds of similar statutes. The Court in *Printz* noted: "We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case." ___ U.S. at ___, 117 S. Ct. at 2376.

The Siletz Tribe's petition presents just such a case. IGRA is a federal regulatory scheme. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (gaming is regulatory in nature). Section 20 of IGRA makes the Governor of a State central to enactment or administration of one part of the federal regulatory scheme. The constitutional violation in Section 20 of IGRA is perhaps more blatant than the violation found under the Brady Act in *Printz*, which Congress enacted pursuant to its Interstate Commerce authority. As this Court recently noted in *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114 (1996):

> "[O]ur inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

If a federal requirement of State involvement in a federal regulatory program enacted under the Interstate Commerce Clause is unconstitutional, where States retain a residual sovereign interest, then a more intrusive State role in a federal regulatory program enacted under the Indian Commerce Clause, where the States have no residual sovereign interest under the Constitution, is also constitutionally suspect.

This consequence from the language of Section 20 of IGRA also arises because of the Federal Government's position in *Printz*. In its brief in that case, the Federal Government contrasted the Brady Act by arguing that the Brady Act "does not require the States to add anything in the way of policy to those choices made by the federal government." Br. of United States, p.10. Rather, the United States argued, the Brady Act limited the involvement of local law enforcement officers in the federal regulatory scheme to "interim, limited, and non-policymaking participation" which did "not alter the fundamentally federal character of the approach devised by Congress." *Id.*

The United States conceded in *Printz* that it is unconstitutional for a federal statute to require a State or State officer to make policy for the federal government. Br. of United States at 20-24 (*e.g.*, p.21: "Congress has not required the States to make any substantive policy decisions about who should or should not be eligible to own handguns. . . . "), *citing New York v. United States*, 505 U.S. 144 (1992). The Court in *Printz* rejected the policy distinction advocated by the United States, ___ U.S. at ___, 117 S. Ct. at 2379-83, and held arguments about the non-policymaking burden imposed upon State officers under

the federal regulatory scheme "inappropriate" and offensive to the fundamental principle of separate state sovereignty. *Id.*, 117 S. Ct. at 2383.

Section 20 of IGRA implicates the system of dual sovereignty established by the Constitution, *Printz*, ___ U.S. at ___, 117 S. Ct. at 2376, to an even greater degree than the handgun statute at issue in the *Printz* decision, by giving a federal regulatory scheme an overriding state character. The system of dual sovereignty separates functioning of the state and federal governments because "[t]he Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 2377.

While the Framers left some residual authority in the States under the Interstate Commerce Clause, *Seminole*, *supra*, 517 U.S. at ___, 116 S. Ct. at 1126, they removed virtually all authority from the States under the Indian Commerce Clause. *Id.* In including the Indian Commerce Clause in the Constitution, the Framers referred explicitly to the country's negative experience in regulating Indian commerce under the Articles of Confederation, which left substantial authority over Indian affairs with the States. *See* The Federalist No. 42. Madison found the effect of the Articles' attempt to "reconcile a partial sovereignty in the Union, with complete sovereignty in the States," "absolutely incomprehensible" and an endeavor by the Articles to "accomplish impossibilities." *Id.* The Framers responded by removing all authority over Indian affairs from the States through the Indian Commerce Clause. Section 20 of IGRA is a congressional attempt to return

States to their pre-constitutional position under the Articles, and represents an attempt to create a new constitutional arrangement between the States and the Federal Government.

The United States admitted in the *Printz* case that it would be unconstitutional to "[foist] onto the States the obligation to solve a controversial policy issue." Br. of United States at 42, or to mandate "that state executive officials *make policy* at federal command," *Id.* at 20 (emphasis in original). Yet this is exactly what Congress has attempted to do in Section 20 of IGRA: "In enacting IGRA, Congress recognized that gaming is a sensitive and controversial issue in many states." *Confederated Tribes of Siletz Indians of Oregon v. United States, supra,* 110 F.3d 688, 693 (hereinafter "*Siletz*"). App. 13. Allowing Indian tribes to acquire land off-reservation for gaming under IGRA was particularly controversial. Congress rejected State requests for a complete prohibition on such acquisitions. Instead, 25 U.S.C. § 2719 allows Indian tribes to engage in gaming under IGRA on lands acquired in trust before October 17, 1988, and allows gaming on lands acquired in trust after said date (referred to as "newly-acquired lands") if specific standards are met.

In section 2719(b)(1)(A), Congress deprived the Secretary of Interior of the authority to make the final decision to allow gaming by an Indian tribe under IGRA on newly-acquired lands, and delegated that authority to the Governors of the States. Indeed, the Ninth Circuit upheld the constitutionality of Section 20 explicitly under that rationale – that the Governor makes the final policy choice to enact the law. Congress was apparently unwilling to make this controversial policy choice itself, but at

the same time was unwilling to leave that authority where it had resided before enactment of IGRA – with the Secretary of Interior. *Siletz, supra,* 110 F.3d at 694, 698. App. 16, 25-26. Instead, Congress gave this policy responsibility to the Governors of the States. As this Court noted in *Printz,* such legislative action improperly transfers political fallout for a policy choice from Congress to the States, ___ U.S. at ___, 117 S. Ct. at 2382, and compromises the framework of dual sovereignty. ___ U.S. at ___, 117 S. Ct. at 2383.

2. The Ninth Circuit's Decision Incorrectly Holds That Section 20 Of IGRA Does Not Unconstitutionally Diminish The Authority Of The Executive Branch To Execute The Laws Of The United States, Is Inconsistent With Previous Decisions Of This Court Such As *Printz v. United States* And *INS v. Chadha,* And Conflicts With The Decisions Of Other Circuits.

Separation of powers principles of the United States Constitution dictate that Congress cannot impair or diminish the authority of the Executive Branch to carry out its constitutional function of executing the law. *E.g., Mistretta v. United States,* 488 U.S. 361, 382 (1989); *INS v. Chadha,* 462 U.S. 919, 957-58 (1983); (Powell, J., concurring). The District Court found that Section 20 of IGRA unconstitutionally diminished the authority of the Executive Branch by giving the Governor of the State authority to veto the Section 20 determination made by the Secretary of Interior, the Federal Officer legislatively charged with making that decision. 841 F. Supp. at 1486-89. App. 46-52. The court ruled that Congress violated the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and

general separation of powers principles in the language it used in 25 U.S.C. § 2719(b)(1)(A). *Id.* at 1489. App. 52.

The Ninth Circuit reversed the District Court. The court stated that the Siletz Tribe was contending that the power to take land into trust for an Indian tribe for gaming under IGRA was an Executive power under the Constitution rather than a Legislative power. 110 F.3d at 694-95. App. 16. This statement misstates the Tribe's position. The Siletz Tribe readily admits that Congress has plenary power over federal property under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, and plenary power over Indian affairs under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, just as it has plenary power over immigration under the Naturalization Clause, U.S. Const. art. I, § 8, cl. 4; *see INS v. Chadha, supra,* 462 U.S. at 940-41.

But the fact that Congress has plenary power over a subject area does not end the constitutional inquiry. Congress must exercise this authority in a constitutionally acceptable fashion. *INS v. Chadha, supra,* 462 U.S. at 941. The Constitution gives Congress the power to legislate. *See, e.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs."). The Constitution does not give Congress the power to execute or modify laws once enacted, except by further legislation. *See INS v. Chadha,* 462 U.S. 919 (1983).

When a power is committed to Congress in the Constitution, the authority of the Executive Branch is limited

to implementing and applying the policy choice that Congress has made. *See Touby v. United States*, 500 U.S. 161, 165 (1991). So long as Congress has laid down an "intelligible principle" to which the action of the Executive Branch must conform, the nondelegation doctrine rooted in the separation of powers principle has not been violated. *Id.* Judicial review, to determine whether the will of Congress has been obeyed, is essential for constitutionality under the nondelegation doctrine. *Id.* at 168-69.

When the Executive Branch acts to apply the intelligible principle set out by Congress, it is acting in its constitutional capacity as the branch of government assigned to execute the laws. *Printz v. United States, supra,* ___ U.S. at ___, 117 S. Ct. at 2378 ("The Constitution does not leave to speculation who is to administer the laws; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through the officer whom he appoints . . . , Art. II, § 2."); *INS v. Chadha, supra,* 462 U.S. at 951 ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."). "[T]he powers delegated to the three Branches are functionally identifiable." *Chadha, supra, id.*

In Section 20 of IGRA, Congress established specific standards for the Executive Branch to apply in an elaborate administrative process. The Secretary of Interior is to use the administrative process already in place, 25 CFR Part 151, pursuant to the statute authorizing him to take land into trust for Indians, 25 U.S.C. § 465. *Siletz, supra,* 110 F.3d at 692. App. 10. 25 U.S.C. § 2719(b)(1)(A) then establishes two additional criteria which the Secretary must meet as part of the administrative process – whether

the proposed gaming establishment on newly acquired lands "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." This standard comprises an intelligible principle established by Congress for the Executive Branch to apply. *Touby v. United States, supra,* 500 U.S. at 165.

The Ninth Circuit incorrectly ruled that when the Secretary of Interior carries out his responsibilities under Section 20, he is exercising a Legislative function, not an Executive function. *Siletz, supra,* 110 F.3d at 696. App. 20-21. According to the Court of Appeals, Congress has delegated to the Secretary of Interior the authority to enact law and make policy under Section 20. *Id.* at 695-96. App. 18-21. This ruling by the Ninth Circuit is generally in conflict with the rulings of this Court in *Chadha, Printz, Buckley v. Valeo,* 424 U.S. 1 (1976), and other separation of powers cases decided by the Court. It also conflicts with the specific ruling in *Printz* that Congress cannot transfer the responsibility to implement a federal law to state officials in the 50 States, who are not subject to meaningful Presidential control, without violating the Appointments Clause and separation of powers principles. ___ U.S. at ___, 117 S. Ct. at 2378.

The court's decision is also in conflict with other Circuits regarding whether the Secretary of Interior is exercising executive or legislative authority under the Constitution when he carries out his responsibilities under 25 U.S.C. § 465. *E.g., State of Florida, Dept. of Bus. Reg. v. United States Dept. of Interior,* 768 F.2d 1248 (1985), *cert. denied,* 475 U.S. 1011 (1986); *Chase v. McMasters,* 573 F.2d 1011 (8th Cir.), *cert. denied,* 439 U.S. 965 (1978); *South*

Dakota v. United States, 69 F.3d 878 (8th Cir. 1995), *vacated on other grounds*, ___ U.S. ___, 117 S. Ct. 286, *mandate recalled and opinion vacated*, 106 F.3d 247 (8th Cir. 1996).[1]

The Ninth Circuit also incorrectly applied the rule of *Buckley v. Valeo* when it held that the Governor did not exercise significant authority under Section 20 of IGRA because she does not necessarily have to exercise that authority numerous times or on a regular basis. *Siletz, supra*, 110 F.3d at 697-98 (citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991)). App. 22-25. The court's decision on this issue is also inconsistent with this Court's recent decision in *Printz*, supra, ___ U.S. at ___, 117 S. Ct. at 2383.

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[1] The primary claim in *South Dakota* – whether the absence of standards in 25 U.S.C. § 465 and the Secretary's complete discretion to take lands into trust violated the nondelegation doctrine – is not at issue in the present appeal because Congress modified section 465 when it enacted Section 20 of IGRA by adding two standards before the Secretary can take land into trust for an Indian tribe for gaming. This standard constitutes an intelligible principle for the Secretary to apply. In addition, Congress modified section 465 explicitly for the Siletz Tribe when it enacted the Siletz Indian Tribe Restoration Act in 1977, 25 USC § 711a(a) (expressly extending § 465 to the Siletz Tribe), and in the Siletz Reservation Act enacted in 1980. Pub. L. No. 96-340, 94 Stat. 1072 (Sept. 4, 1980). These two statutes and their legislative histories set out in detail the Tribe's need for land and the purposes for which it could be acquired.

The lack of judicial review identified in *South Dakota*, 69 F.3d at 881-82, to determine whether the delegee has conformed its conduct to the principle laid down by Congress, is an issue in the present case. The only difference is that it is the Governor's conduct under Section 20 for which no judicial review exists, not the Secretary's conduct.

3. The Ninth Circuit's Ruling That Section 20 Of IGRA Is Contingent Legislation Incorrectly Applies The Contingent Legislation Rulings Of This Court. If Section 20 Is Contingent Legislation, It Violates The Nondelegation Doctrine.

The Court of Appeals ruled that Section 20 of IGRA is contingent legislation which requires that certain conditions be met before the statutory provision goes into effect. 110 F.3d at 695. App. 16-19. This ruling misconstrues the Court's previous contingent legislation cases, *e.g.*, *Currin v. Wallace*, 306 U.S. 1 (1939); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); and *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939), and undermines separation of powers principles of the Constitution to a substantial degree.

The Court's contingent legislation cases upheld statutes which conditioned application of a statute on a vote of approval by those affected – a simple, easily determinable fact. The Ninth Circuit attempted to apply these holdings to the action required of the Governor under Section 20 of IGRA by characterizing the Governor's responsibility under the statute as "local approval." *Siletz, supra*, 110 F.3d at 695. App. 16. This ruling completely mischaracterizes the nature of the authority delegated to the Governor under 25 U.S.C. § 2719(b)(1)(A).

First, in Section 20 of IGRA the Governor is assigned a very specific duty. After the Secretary of Interior makes his positive determination under the section that "a gaming establishment on newly acquired lands would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community," the

Governor must concur "in the Secretary's determination." This intelligible principle does not give the Governor the authority to just say yes or no to a gaming fee-to-trust proposal; her decision theoretically is limited to the two criteria upon which the Secretary made his previous, positive determination.

As previously noted in this petition, a key element of the nondelegation doctrine is the element of judicial review to determine whether the will of Congress has been obeyed. *Touby v. United States, supra,* 500 U.S. at 168. By characterizing the involvement of the Governor under Section 20 as the local approval of contingent legislation, the Ninth Circuit has insulated the Governor's action from judicial review to determine whether her nonconcurrence can be substantiated under the "best interest" or "not detrimental to the surrounding community" standards set out in the statute. Under the Ninth Circuit's ruling, the Governor could refuse to approve a Tribe's Section 20 gaming proposal for no reason at all, or even for an unconstitutional reason (such as racial animus). If she does not concur, the Secretary cannot proceed. *Siletz, supra,* 110 F.3d at 696, 698. App. 20, 25-26. In contrast, the Secretary's decision under these standards can be appealed, by the State or the Tribe.

Second, there is a substantial constitutional difference between the simple local approval required in the contingent legislation cases cited by the Court of Appeals and what must occur before the Governor concurs under Section 20 of IGRA. As set out in the Statement of the Case, above, the Secretary of Interior engaged in an extensive administrative process in considering the Siletz Tribe's fee-to-trust application. The Tribe's application

was reviewed several times at each level of the Bureau of Indian Affairs and Department of Interior. State and local governments, Indian tribes, and individuals were given numerous opportunities to submit comments and factual information to the Secretary on the Tribe's application. The Department engaged in fact-finding, weighing of the evidence, and an administrative determination.

The Ninth Circuit classified the Secretary's action under Section 20 as a mere "recommendation." *Id.* at 694. App. 16. This ignores the express statutory language, which classifies the Secretary's action as a determination. The Ninth Circuit's holding on this issue appears to be an attempt to avoid *INS v. Chadha, supra,* 462 U.S. at 952-53, where this Court held that it was unconstitutional for Congress to veto a determination made by an Executive Branch official except through the vehicle of bicameral legislation.

The Ninth Circuit's contingent legislation ruling also raises important constitutional questions regarding differences between the Interstate Commerce Clause and the Indian Commerce Clause. All of the contingent legislation cases cited by the Ninth Circuit in its decision involved the Interstate Commerce Clause. As noted before in this petition, this Court has ruled that the Constitution left some residual authority with States over interstate trade, *Seminole, supra,* 517 U.S. at ___, 116 S. Ct. at 1126, which may have affected the Court's approval of limited, delegated local input in those cases.

In contrast, the Constitution divested States of virtually all authority over Indian commerce and Indian

tribes. *Id.* Before applying contingent legislation principles to IGRA, therefore, the court should have analyzed whether it was appropriate under the Constitution to permit state approval of federal Indian legislation. "It is also well-established that the Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). As the Court noted in *Cotton*, "[t]he extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id. See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

The Ninth Circuit's decision that it is acceptable to include a State official in the enactment or administration of a federal statute should also be reviewed in light of the Court's decision in *Printz v. United States, supra.* The Court found such involvement to be fundamentally incompatible with the structural framework of dual sovereignty. ___ U.S. at ___, 117 S. Ct. at 2384. As this Court has noted in a number of cases, *INS v. Chadha, supra*, 462 U.S. at 958-59; *New York v. United States, supra*, 505 U.S. at 187, and *Printz v. United States, supra*, 117 S. Ct. at 2383, there is no doubt that Congress' inclusion of the Governor in the Section 20 IGRA process is a convenient and effective way to include the States in what is likely to be a controversial decision. As those decisions all hold, however, the Constitution places a higher value on the structure created therein, and convenience or efficiency is not an excuse for an unconstitutional exercise of Congress'

legislative authority. Consent of the States to the infringement of their constitutional sovereignty does not obviate the constitutional violation. *New York v. United States*, *supra*, 505 U.S. at 180-83.

4. The Ninth Circuit's Incorrect Ruling That The Governor Exercises Her Authority Under Section 20 Of IGRA As A State Executive, Under Authority Of State Law, And In The Performance Of A State Function, Raises Substantial Constitutional Concerns.

The Ninth Circuit incorrectly held that when the Governor of the State exercised her concurrence authority under Section 20 of IGRA to reject the Siletz Tribe's gaming proposal, she was exercising state authority. *Siletz*, *supra*, 110 F.3d at 697. App. 24. The court ruled that the concurrence is given effect as a matter of federal law, but that the Governor's authority to act was provided by state law, *id.*, and she was acting in the performance of a state function. *Id.* at 968. App. 26.

This ruling raises substantial constitutional concerns. Neither the court nor the appellees (State and United States) in the Court of Appeals cited a state constitutional, statutory, or regulatory provision which gave the Governor of Oregon the authority to participate in the fee-to-trust decision or to make a decision on whether to allow land to be taken in trust under IGRA for an Indian tribe for the purpose of Indian gaming. There is a total absence of state legal authority for the Governor's participation in this federal regulatory scheme. No state law permits this activity by the Governor. *Cf.* Ariz. Rev. Stat. § 5-601 (directing the Governor to oppose all fee-to-trust applications for Indian gaming).

Can a federal statute require a Governor to act beyond her constitutional or statutory authority as a matter of federal law, and make such action the exercise of state authority? For example, the Ninth Circuit held that the action of the Governor under Section 20 is contingent legislation, thus requiring her to enact law. *Siletz, supra,* 110 F.3d at 695-96. App. 18, 20. This is a legislative function, which the Oregon Constitution, art. IV, § 1, vests in the Oregon legislature. How can the Governor be exercising state authority as a matter of state law in such an instance? *See Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1550-51, 1557-58 (10th Cir. 1997), *pet. for cert. filed,* 65 U.S.L.W. 3713 (April 10, 1997). The Court in *Printz v. United States, supra,* did not have to resolve this question, ___ U.S. at ___, 117 S. Ct. at 2384 n.18, but it must be resolved in this case if the Ninth Circuit's Appointments Clause ruling (that the Governor is not exercising significant federal authority because she is acting under state law authority under Section 20) is upheld.

The conjunction of this ruling with a recent ruling of this Court raises another significant constitutional problem. In *Idaho v. Coeur d'Alene Tribe of Idaho,* ___ U.S. ___, 117 S. Ct. 2028 (1997), a divided majority of this Court held that a state official acting pursuant to state law could not be sued under the *Ex parte Young* doctrine if the effect of the suit would be to deprive the State of regulatory power over the land or subject matter at issue. ___ U.S. ___, 117 S. Ct. at ___. (O'Conner, J., concurring). The effect of any concurrence by a Governor under Section 20 of IGRA would be to permit the land at issue to be taken into trust by the United States (depriving the State of regulatory authority over the land), and to allow the

Tribe to engage in gaming activities free of state law constraints (depriving the state of regulatory authority over gaming). If the Governor is exercising her authority under Section 20 as a matter of state law, as the Ninth Circuit ruled, then under *Coeur d'Alene* the Governor would not be subject to judicial challenge of her Section 20 decision, insulating the federal statute from judicial review.

Carrying this implication further, Congress could act to insulate future federal enactments from judicial review by the federal courts by authorizing a state official to enact or administer the federal regulatory scheme under state law authority. Such a result would have substantial implications for the ability of the Judicial Branch to exercise its constitutional authority.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, *Plaintiff-Appellant-Cross-Appellee,* v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; JOHN D. LESHY, *Defendants* and UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF INTERIOR; TOM SANSONNETTI; BRUCE BABBITT, Secretary of the Department of Interior; ADA E. DEER, Assistant Secretary of the Department of Interior for Indian Affairs, *Defendants-Appellees-Cross-Appellants,* and JOHN KITZHABER, Governor of the State of Oregon; STATE OF OREGON, *Defendants-Intervenors-Appellees-Cross-Appellants.*	Nos. 94-35304 94-35373 94-35374 D.C. No. CV-92-01621-JMB ORDER AND AMENDED OPINION

Appeals from the United States District Court
for the District of Oregon
James M. Burns, District Judge, Presiding
Argued and Submitted July 10, 1995
Submission withdrawn April 4, 1996
Resubmitted March 20, 1997
Portland, Oregon

Filed March 31, 1997
Amended June 13, 1997

Before: Procter Hug, Jr., Chief Judge, Alfred T. Goodwin, Circuit Judge, and William W. Schwarzer,* District Judge.

Opinion by Chief Judge Hug

SUMMARY

Government Law/Native Americans

The court of appeals affirmed a judgment of the district court. The court held that the Indian Gaming Regulatory Act (IGRA) requirement that the governor of a state concur in granting tribes land in trust for gaming does not violate the Appointments Clause or separation of powers principles.

Appellant Confederated Siletz Tribes of Oregon applied to the Secretary of Interior to have land taken in trust for the purpose of gaming. The Secretary determined that the proposal was in the best interest of the

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Tribes and not detrimental to the community. The governor of Oregon refused to concur. Accordingly, the Secretary denied the Tribes' application.

The Tribes challenged the denial in federal court. The district court found that the language in § 2719(b)(1)(a) of the IGRA requiring the state governor's concurrence violated separation of powers principles, reasoning that the governor's concurrence made *after* the Secretary's finding "impermissibly undermines" the executive's authority to take care that the laws are executed properly. The court also determined that the provision violated the Appointments Clause by giving the Governor authority to act as an officer of the United States without being appointed through proper channels and by authorizing the Governor to exercise significant authority by vetoing findings of the Secretary.

The Tribes were denied relief because the court severed § 2719(b)(1)(a) from the IGRA. The United States and the Tribes filed cross-appeals.

The IGRA was enacted to accommodate the interest of Indian tribes with the regulatory interest of the states. The IGRA prohibits the Secretary from acquiring land in trust for a tribe for gaming purposes, unless the governor of the state in which the land is located, along with the Secretary, agree that such acquisition would be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community.

In determining whether an Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally

assigned functions. This requires consideration of the governmental branch to which the function in question is traditionally assigned and the control of the function retained by the branch.

The Property Clause gives Congress the sole power to acquire land for the federal government. When land is acquired in trust for Indians, Congress, not the President, is empowered to set the rules and regulations for its use. Congress has delegated power to the Secretary to choose which land is to be taken into trust, within expressed guidelines.

Deciding when and how a law is to be applied is not solely an executive power. Congress is constitutionally able to enact legislation which is contingent upon the approval of others. By placing a condition upon when and under what circumstances a provision of a statute goes into effect, Congress does not infringe upon the executive's ability to execute that statute.

Regardless of who acts first, the governor has to agree that gaming should occur. If the Secretary was prevented from considering taking land into trust for gaming purposes until the Governor approached him, there would be no constitutional problems. There is no difference between that situation and what the statute required.

The governor's concurrence provision did not violate the separation of powers doctrine.

The governor had not been appointed as a federal officer in accordance with the Appointments Clause. In determining whether IGRA violates the Appointments

Clause, the appropriate inquiries are whether the governor exercises "significant authority" under the IGRA, and whether the IGRA vests in the governor "primary responsibility" for determining the applicability of IGRA's exceptions.

The authority exercised by the governor under the IGRA was not significant enough to require appointment. Under the IGRA, the governor operates on an episodic basis concurring in or rejecting the suggestion of the Secretary regarding the gaming on lands within the governor's state. The governor is not given sole authority for enforcing the IGRA. Instead, the IGRA requires that the Secretary, a properly appointed officer of the United States, determine the federal interests in the project.

When the governor responds to the Secretary's request for a concurrence, the governor acts under state law, as a state executive, pursuant to state interests. The governor does not act with "significant authority" under federal law.

Because Congress has given guidelines to the Secretary regarding when land can be taken in trust, the primary responsibility for choosing land to be taken in trust still lies with Congress. The governor's authority under the IGRA extends only to making a single determination – which is unlikely to arise often in a particular state. The narrow concurrence function does not impermissibly undermine executive branch authority.

COUNSEL

Craig J. Dorsay, Meyer & Wyse, Portland, Oregon for the plaintiffs-appellants-cross-appellee.

David C. Shilton, United States Department of Justice, Washington, D.C. for the defendants-appellees-cross-appellants.

Michael D. Reynolds, Assistant Solicitor General and Elizabeth S. Harchenko, Assistant Attorney General, Salem, Oregon for the defendants-intervenors-appelees-cross-appellants.

Bruce R. Greene, Greene, Meyer & McElroy, Boulder, Colorado for amicus Sault Ste. Marie Tribe of Chippewa Indians.

Thomas F. Gede, Assistant Attorney General, Sacramento, California, for amici states.

ORDER

The opinion filed on March 31, 1997, slip op. 3513, and appearing at 110 F.3d 688 (9th Cir.1997), is amended as follows:

At slip op. 3523, beginning "The power to control . . . " and ending " . . . for the purpose of gaming." substitute the following:

> The power to place public lands in trust for Native Americans for the purpose of gaming is not an Executive power. The Property Clause of the Constitution states that '[t]he Congress shall

have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. This clause gives Congress the sole power to acquire land for the Federal Government. *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 21 L.Ed. 457 (1872). When land is acquired in trust for the Indians, Congress, and not the President, is constitutionally empowered to set the rules and regulations for its use. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942). "[W]hile courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1975).

Moreover, Congress enacted IGRA pursuant to its powers under the Indian Commerce Clause of the United States Constitution. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1119, 1127 (1996). "[T]he central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

With this amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

HUG, Chief Judge.

This appeal concerns the interpretation of a provision of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719. That Act precludes most gaming on land acquired in trust for an Indian tribe after 1988, unless one of several exceptions applies. The exception pertinent to this case permits such gaming provided (1) that the Secretary of the Interior determines that it is in the best interests of the tribe and not detrimental to the surrounding community and (2) that the Governor of the state concurs in that determination. The Secretary denied the gaming application of the Confederated Tribes of Siletz Indians of Oregon ("the Tribes") because the Governor did not concur in the Secretary's favorable determination. The Tribes brought this action to contest the Secretary's denial of their application. The district court entered summary judgment upholding the denial of the application. The principal issue raised in this case is whether the requirement of the Governor's concurrence violates the Appointments Clause or the separation of powers principles under the United States Constitution. In affirming, we hold that it does not.

I.

The Confederated Tribes of Siletz Indians of Oregon (the "Tribes") contest the denial of their application to

have land taken in trust for their benefit for the purpose of establishing a gaming facility. The Secretary of the Interior denied the Tribes' application because, pursuant to 25 U.S.C. § 2719(b)(1)(A) of IGRA, gaming on newly acquired trust land requires the concurrence of the Governor of the state in which the trust land is located, and the Governor of the State of Oregon refused to concur. The Tribes filed in the district court an action seeking reversal of the Secretary's denial of their application and the State of Oregon intervened.

The district court found that the Governor's concurrence provision of IGRA, 25 U.S.C. § 2719(b)(1)(A), violates both the Appointments Clause and separation of powers principles because it allows a state governor to "veto" findings made by the Secretary of the Interior. The Tribes were nonetheless denied relief. The district court held that because the remaining portion of section 2719(b)(1)(A) could not function independently in a manner consistent with the intent of Congress, the entire section 2719(b)(1)(A) must be severed from IGRA.

The Tribes appealed the district court's judgment, claiming that the district court erred by severing the entire exception provision of the statute. The United States cross-appealed, contending that the district court erred in finding the Governor's concurrence provision unconstitutional, but agreeing with the Tribes that the district court erred in severing too much of the statute. The State of Oregon, as intervenor, also cross-appealed, agreeing with the United States that the district court erred in finding the Governor's concurrence provision unconstitutional, but contending that if the requirement

were unconstitutional, the court was correct in its severance order. We have jurisdiction of these appeals pursuant to 28 U.S.C. § 1291, and we affirm the judgment of the district court on different grounds. We uphold the Secretary's denial of the Tribe's trust application because § 2719(b)(1)(A) does not violate either the Appointments Clause or separation of powers principles.

II.

The Confederated Siletz Tribes of Oregon applied to the Secretary of the Interior to have land taken in trust for the purpose of gaming. The Secretary of the Interior is authorized to take land in trust for the benefit of an Indian tribe

> (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a) (authorized by 25 U.S.C. § 465).[1] Gaming on Indian land, including trust land, is governed by IGRA. IGRA was the outgrowth of several years of

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[1] Section 465 states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for the Indians.

discussions and negotiations seeking a method to allow the states to be involved in the regulation of Indian gaming in light of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *See* S. Rep. 446, 100th Cong., 2d Sess. 1-2, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-72. Section 2719(a) of IGRA states:

> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 . . .

Section 2719(b) provides a number of exceptions to the general prohibition. The exception at issue in this case is section 2719(b)(1)(A), which reads:

> (1) Subsection (a) of this section will not apply when –
>
> > (A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination*. . . .

(emphasis added.)

The Tribes first approached the Bureau of Indian Affairs ("BIA") in March 1992, with their proposal to have land taken in trust for the purpose of gaming. The

land at issue is a 16-acre tract of land near Salem, Oregon, 50 miles from the Tribes' reservation. The BIA requested comments on the proposal from the County and the City of Salem. On April 20, 1992, the Governor submitted objections to the proposal.

In June 1992, the Tribes submitted their formal application to have the land taken in trust. The BIA again solicited comments from the County, the City of Salem, the Governor, and other local tribes. In October 1992, the Governor again submitted objections to the application. On November 6, 1992, the Secretary of the Interior found that the proposal was in the best interest of the Tribes and not detrimental to the community and sought the Governor's concurrence in his determination. The Governor refused to concur. On December 21, 1992, the Secretary denied the Tribes' application on the ground that the Governor did not concur in this determination. The Secretary invited the Tribes to reapply for acquisition of the land in trust for nongaming purposes.

The Tribes filed an action to challenge the denial of their application. The district court held that the language in section 2719(b)(1)(A), requiring the state governor's concurrence, violated the Appointments Clause and separation of powers principles. *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1489 (D.Or.1994). The district court also held that section 2719(b)(1)(A) must be severed in its entirety in order to be consistent with the intent of Congress to permit gaming on such newly acquired territory only with the State's concurrence. *Id.* at 1490-91. It therefore denied the Tribes' appeal of the Secretary's denial of their trust application because there was no longer an exception to section

2719(a) through which they could establish gaming on newly acquired lands. *Id.* at 1491.

III.

We review the constitutionality of a statute *de novo. United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747 (9th Cir.1993), *cert. denied*, 510 U.S. 1140 (1994).

When reviewing congressional enactments, such as IGRA, for constitutional infirmities, we give "great weight to the decision of Congress." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980). In addition, a court is obligated, whenever possible, to interpret a statute in a manner which renders it constitutionally valid. *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988). "When [a federal court] is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should do so only for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (quoting *Bowsher v. Synar*, 478 U.S. 714 (1986) (Stevens, J., concurring)).

IV.

In enacting IGRA, Congress recognized that gaming is a sensitive and controversial activity in many states. This statute attempted to accommodate the interest of the Indian tribes with the legitimate regulatory interests of the states. The provision of IGRA here at issue deals with the acquisition of land by the Secretary of the Interior to

be held in trust for a tribe for gaming purposes when that land is not contiguous to its reservation. After 1987, with certain exceptions not here pertinent, an acquisition for such purposes was precluded unless the Governor of the State in which the land is located, along with the Secretary of the Interior, agrees that such acquisition would "be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Congress recognized the federal and state concerns and provided that both had to be satisfied by requiring action by the appropriate federal and state officials.

The separation of powers doctrine, implicit in the Constitution and well-established in case law, forbids Congress from infringing upon the Executive Branch's ability to perform its traditional functions. *Mistretta*, 488 U.S. at 381; *Boeing*, 9 F.3d at 749-50. The Tribes contend that the Governor's concurrence provision of IGRA is unconstitutional because it impermissibly reassigns the function of taking land in trust for Indians from the Executive Branch to state governors.

"[I]n determining whether the Act [in question] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977). Although the Supreme Court has not announced a formal list of elements to be considered when determining whether a violation of the doctrine has taken place, it has

consistently looked to at least two factors: (1) the governmental branch to which the function in question is traditionally assigned, *see Mistretta*, 488 U.S. at 364; *Morrison v. Olson*, 487 U.S. 654, 694-96 (1988); and (2) the control of the function retained by the branch, *see Mistretta*, 488 U.S. at 408-12; *Morrison*, 487 U.S. at 692-96. In examining IGRA in light of these factors, we conclude that the provision requiring the Governor's concurrence does not violate the separation of powers doctrine.

The power to place public lands in trust for Native Americans for the purpose of gaming is not an Executive power. The Property Clause of the Constitution states that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. This clause gives Congress the sole power to acquire land for the Federal Government. *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 21 L.Ed. 457 (1872). When land is acquired in trust for the Indians, Congress, and not the President, is constitutionally empowered to set the rules and regulations for its use. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942). "[W]hile courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1975).

Moreover, Congress enacted IGRA pursuant to its powers under the Indian Commerce Clause of the United States Constitution. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1119, 1127 (1996). "[T]he central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian

affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

Through 25 U.S.C. § 465, Congress has delegated its constitutionally derived power to acquire property for the Indians to the Secretary of the Interior. This delegation allows the Secretary to choose which land is to be taken into trust but only within the guidelines expressed by Congress. By adopting 25 U.S.C. § 2719, Congress has placed limitations on that delegation with regard to land acquired for gaming purposes without local approval. Congress has the authority to delegate limited legislative responsibilities to the Executive Branch. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 19 (1825) ("[C]ongress may certainly delegate to others, powers which the legislature may rightfully exercise itself.").

The Tribes assert that the Governor's concurrence provision allows Congress to undermine the President's constitutionally assigned duty to execute the laws. By allowing a state governor to "veto" the recommendation of the Secretary of the Interior, the Tribes contend that IGRA unconstitutionally prevents the Executive Branch from interpreting and enforcing the laws of the United States. We disagree.

The Tribes' assertion that deciding when and how a law is to be applied is solely an Executive power has been considered and rejected by the Supreme Court on several occasions. Congress is constitutionally able to enact legislation which is contingent upon the approval of others.

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective,

> because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928). Such contingent legislation is not an invalid delegation of legislative authority and does not violate the separation of powers. *Id.*

Contingent legislation is constitutionally acceptable in many forms. In *Currin v. Wallace*, 306 U.S. 1 (1939), the Supreme Court was called upon to determine the constitutionality of the Tobacco Inspection Act of August 23, 1935. The Act allowed the Secretary of Agriculture to designate certain tobacco auctions as interstate tobacco markets. *See* 7 U.S.C. § 511(d). However, the Secretary's determination that an auction so qualified was contingent upon the concurrence of the affected farmers: "No market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting [at a referendum during the preceding marketing season] favor it." *Id.* The Supreme Court stated that such a condition incorporated into the legislation was appropriate. "So far as growers of tobacco are concerned, the required referendum does not

involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.' " *Currin*, 306 U.S. at 15; *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities . . . the determination of facts to which the policy as declared by the legislature is to apply").

By placing a condition upon when and under what circumstances a provision of a statute goes into effect, Congress does not infringe upon the Executive's ability to execute that statute. By requiring local approval, Congress is exercising its legislative authority by providing what conditions must be met before a statutory provision goes into effect. *Currin*, 306 U.S. at 15; *see also United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577-78 (1939) (upholding a condition precedent requiring approval of two-thirds of producers of agricultural products);[2] *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th

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[2] [N]o order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

> (A) By at least two-thirds of the producers . . . . or
>
> (B) By producers who . . . have produced for market at least two-thirds of the volume of such commodity produced for market. . . .

Agriculture Marketing Agreement Act of 1937, § 8c(9), 50 Stat. 246 (codified as amended 7 U.S.C. § 608c(8)).

Cir.1992), *modified* 985 F.2d 1419 (9th Cir.1993) (reaffirming that the statute at issue in *Rock Royal* was not an invalid delegation, but rather a legitimate condition precedent); *United States v. Ferry County*, 511 F.Supp. 546, 552 (E.D.Wash.1981) (upholding a federal statute that allowed the Secretary to acquire land in trust for an Indian tribe only if local county officials consented).

In addition to these statutes, the Supreme Court has addressed statutes requiring approval by state courts, state legislatures, and, as in this case, state governors. *See, e.g., Parker v. Richard*, 250 U.S. 235, 238-40 (1919) (upholding a provision in a federal statute which conditioned the conveyance of certain Indian lands upon the approval of a state court);[3] *North Dakota v. United States*, 460 U.S. 300, 302-03, n. 3, 310 (1983) (interpreting federal statutes which conditioned federal acquisition of waterfowl refuges on approval by the state legislature and state governor).[4]

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[3] [T]he death of any allottee . . . shall operate to remove all restrictions upon the alienation of said allottee's land; *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.

Act of May 27, 1908, § 9, 35 Stat. 312.

[4] The Conservation Act authorized the Secretary of the Interior to acquire land for use as "inviolate sanctuaries for migratory birds," but the state in which the land is located must "have consented by law to the acquisition." 16 U.S.C. § 715e. The statute providing a source of funds for the land acquisition also provided that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency." 16 U.S.C. § 715k-5.

The district court rejected the "contingent legislation" analysis and held that the Executive's power was undermined. The court stated that with IGRA, "Congress delegate[d] to a state official the power to veto a favorable determination by an official of the Executive Branch." *Confederated Tribes,* 841 F.Supp. at 1488. The court held that the fact that the governor's concurrence is made *after* the Secretary's finding "impermissibly undermines" the executive's authority to take care that the laws are executed properly. *Id.*

We conclude that the formality of which official acts first should not be determinative. The important consideration is that both officials must act. Regardless of who acts first, the effect of the provision is that the Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place. All parties agree that if the Secretary was prevented from considering taking land into trust for gaming purposes until the Governor approached him, there would be no constitutional problems. We see no difference between that situation and what the statute requires here.[5]

The power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power. The delegation is limited by a contingent requirement of State approval. This does not undermine an executive function, it merely places restrictions on the Executive's ability to choose which land is to be taken

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[5] We note that the statutes at issue in *Currin* and *Rock Royal* do not specify whether the individual farmers or the Secretary of Agriculture should decide first. We find the order of the decisions irrelevant to their holdings.

into trust for gaming purposes – a legislative function. We therefore hold that the governor concurrence provision of IGRA does not violate the separation of powers doctrine.

V.

We now turn to the argument that the contested provision of IGRA violates the Appointments Clause. The Constitution provides that the President shall appoint "all . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law. . . . " U.S. Const. art. II, § 2, cl. 2. Persons "who are not appointed . . . and who therefore can not be considered 'Officers of the United States' may not discharge functions that are properly discharged only by officers." *Boeing*, 9 F.3d at 757. The Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another branch, and preserves constitutional integrity by preventing the diffusion of appointment power. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878 (1991).

The district court ruled that the Governor concurrence provision of IGRA violated the Appointments Clause by giving the Governor authority to act as an Officer of the United States without being appointed through proper channels. *Confederated Tribes*, 841 F.Supp. at 1486-87. The district court determined that by requiring the Governor to concur in the Secretary's decision to allow gaming on newly acquired trust land, the Governor exercised significant authority over federal government actions through a congressional grant of power. *Id.*

There is no question that the Governor has not been appointed as a federal officer in accordance with the Appointments Clause or that the Governor is not a federal officer in fact. It is clear the Governor is a state official. We must, however, inquire whether, under this statute, the Governor is performing duties reserved for officers of the United States. The test promulgated by the Supreme Court to assess whether persons are exercising authority that can only properly belong to appointed Officers is whether those persons "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. In *Buckley*, the Court held that statutory provisions vesting the Federal Elections Commission with the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violated the Appointments Clause because only appointed federal officers may perform such functions. *Id.* at 140. Thus, the appropriate inquiries in this case are whether the Governor exercises "significant authority" under IGRA, and whether IGRA vests in the Governor "primary responsibility" for determining the applicability of IGRA's exceptions. We hold that the authority vested in the state governors through IGRA does not rise to the level of that of an officer of the United States.

The district court determined that the Governor exercised significant authority under IGRA. Because the Governor was allowed to "veto" the findings of the Secretary, the district court ruled that this authority could only be exercised by a federal officer appointed by the President. We disagree.

The subject of what constitutes significant authority under the laws of the United States has received much attention by the federal courts in recent years. In *Freytag*, the Supreme Court held that special trial judges exercised significant authority over enforcing the laws of the United States. *Freytag*, 501 U.S. at 881. Key to the Court's opinion was the fact that special trial judges *regularly* made decisions regarding discovery, trial, and discovery matters. *Id.* at 881-82. The Court distinguished special trial judges from special masters whose duties were temporary and episodic in nature. *Id.* at 881. Special masters, the Court held, were not officers because the master did not have the same discretion under the law given to special trial judges. *Id.* at 882.

In *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir.1993), *cert. denied*, 510 U.S. 1140 (1994), this court was called upon to interpret "significant authority" in the context of qui tam relators under the False Claims Act. The Act authorized individuals to sue on behalf of the federal government for vindication of public rights. Although the Federal Government is given the opportunity to intervene in the lawsuit, the individual relator has the opportunity to continue the lawsuit even if the Government believes that such a suit is not warranted. We determined that the authority exercised by relators was not so significant as to require appointment. *Id.* at 758-59.

We conclude that the authority exercised by the Governor under IGRA is also not significant enough to require appointment. Under IGRA, the Governor operates on an episodic basis concurring in or rejecting the suggestion of the Secretary for the Interior regarding gaming on

lands within the Governor's state. The Governor is not given the sole authority for enforcing IGRA. Instead, IGRA requires that the Secretary, a properly appointed Officer of the United States, determine the federal interests in the project. The Governor cannot have land taken in trust without the Secretary's approval.

When the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law. The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law. For example, when faced with a governor's consent requirement in a federal statute authorizing federal acquisition of wetlands, the North Dakota legislature passed a law requiring the governor to obtain the affected county's recommendation before the governor was allowed to consent to the acquisition. *North Dakota*, 460 U.S. at 306-07. In the present case, the consequences of the Governor's exercise of discretion under state law will affect how the Secretary of the Interior will proceed to execute IGRA. No doubt, federal law provides the Governor with an opportunity to participate in the determination of whether gaming will be allowed on newly acquired trust land. But when the Governor responds to the Secretary's request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests. The Governor does not act with "significant authority" under federal law.

Our analysis under the "primary responsibility" aspect of our Appointments Clause analysis naturally flows from our decisions above. We hold that the Governor who exercises authority pursuant to state law does

not have primary responsibility for protecting a federal interest.

IGRA does not allow a state governor to have land taken in trust by the Federal Government. Such a statute would no doubt run afoul of the Appointments Clause. Instead, IGRA is a piece of contingent legislation by which Congress conditions its consent to gaming on two events: (1) the Secretary determining that gaming on those lands would be beneficial to the tribe and not detrimental to the surrounding community; and (2) the Governor's concurring in that determination. Under this scheme, the Governor is not primarily responsible for having land taken into trust, Congress is.

It has long been the rule that Congress may delegate certain legislative functions to persons outside of the Legislative Branch of government. *See, e.g., Panama Refining Co.*, 293 U.S. at 420-21; *Wayman*, 23 U.S. (10 Wheat.) at 43. However, for such a delegation to be permissible, Congress must give specific guidelines to the delegee as to when the statute becomes effective. The general delegation of power to the Executive to take land into trust for the Indians is a valid delegation because Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used. *See Souix* [sic] *Tribe of Indians*, 316 U.S. at 325-26; *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 473 (D.D.C.1978). Prior to 1988, the Secretary had the sole authority to take land in trust for the purpose of gaming. The adoption of IGRA limited the delegation of congressional power by making that delegation conditional on

the concurrence of state governors in certain circumstances.

Because Congress has given guidelines to the Secretary regarding when land can be taken in trust, the primary responsibility for choosing land to be taken in trust still lies with Congress. The Secretary is not empowered to act outside of the guidelines expressed by Congress. Similarly, the Governor has a limited role to play in the scheme.

We stated in regards to qui tam relators,

> The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of "primary responsibility" when it elects to intervene in a qui tam action.

Boeing, 9 F.3d at 758. We concluded, "the qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause." *Id.*

The gubernatorial concurrence provision similarly meets the restrictions of the Appointments Clause. The Governor's authority under IGRA extends only to making a single determination – which is unlikely to arise often in a particular state. This narrow concurrence function does not impermissibly undermine Executive Branch authority, when exercised by the Governor as a state officer, in the performance of a state function, under an

express delegation of congressional power to control Indian lands.

Because of our holding in this case, we do not reach the issue of severability.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, Plaintiff, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR, MANUEL LUJAN, JR., Secretary of the Department of Interior; DR. EDDIE BROWN, Assistant Secretary of the Department of Interior for Indian Affairs; and TOM SANSONETTI, Solicitor for the Department of Interior, Defendants.	CIV No. 92-1621-BU JUDGMENT (Filed Jan. 31, 1994)

This action came on for hearing on the parties' motions for summary judgment. The issues having been heard and a decision having been rendered by Amended Opinion and Order dated January 21, 1994,

IT IS HEREBY ORDERED that the following provision of 25 U.S.C. § 2719(b)(1)(A) is unconstitutional and must be excised: "but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." The remainder of 25 U.S.C. § 2719(b)(1)(A) standing alone is inconsistent with Congress's intent and, therefore, is severed in its entirety

from 25 U.S.C. § 2819(b)(1). Plaintiffs' request for reversal and remand of the Department of Interior's decision is denied.

This action is dismissed. No costs, disbursements, or fees allowed to any party.

DATED this 31st day of January, 1994.

/s/ James M. Burns
UNITED STATES SENIOR
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON,

Plaintiff,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., Secretary of the Department of the Interior; DR. EDDIE BROWN, Assistant Secretary of the Department of the Interior for Indian Affairs; and TOM SANSONETTI, Solicitor for the Department of the Interior,

Defendants,

and

THE STATE OF OREGON and GOVERNOR BARBARA ROBERTS,

Defendants-Intervenors.

CIV NO. 92-1621-BU

AMENDED OPINION AND ORDER

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INTRODUCTION

This case calls upon me to become a gaming master[1] and, as part of that task, to distinguish why gambling can

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[1] Some might say it was clever of Congress to choose the word "gaming," a prissy word no doubt intended to create the vision of a gentleperson's sport or perhaps to elicit a response similar to that aroused by such "All-American" pursuits as baseball, football, etc.; in any case, the choice of words was surely intended to avoid the "gamier" connotations evoked by the word "gambling."

be a godsend for the Grand Ronde, an economic boon for the Cow Creek and Coquille, but seriously detrimental, if not fatal, for the Siletz Tribes.[2]

For a score of years, I have been importuned to be a forest master, *see Oregon Natural Resources Council, Inc. v. United States Forest Service*, 659 F.Supp. 1441 (D.Or. 1987); a herbicide master, *see Northwest Coalition for Alternatives to Pesticides v. Lyng*, 673 F.Supp. 1019 (D.Or. 1987); a range master, *see Natural Resources Defense Council, Inc. v. Hodel*, 624 F.Supp. 1045 (D.Nev. 1985); a prison master, *see Capps v. Atiyeh*, 559 F.Supp. 894 (D.Or. 1983); a freeway master, *see Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891 (D.Or. 1977); a dog master, *see Bowlin v. Deschutes County*, 712 F.Supp. 803 (D.Or. 1988); and so on and so on. I find, however, I am able to refuse the offer to assume this latest grandiose role.

PROCEDURAL HISTORY

The Confederated Tribes of Siletz Indians of Oregon (Siletz Tribes) filed two motions for summary judgment (#7, #42) in which they seek reversal of the decision made by the Department of Interior (DOI) denying the Siletz Tribes' request to have land placed in trust for the purpose of establishing a gaming operation-pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* (1988). The State of Oregon and Governor Barbara

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[2] I have been, fortunately or unfortunately, asked to decide the issues at hand without the benefit of guidance from the "Gaming Think Tank" planned by the new National Indian Gaming Institute, College of the Menominee Nation, Keshena, Wisconsin. *See The Wall Street Journal*, Jan. 13, 1994, at A1.

Roberts[3], who were permitted to intervene as defendants on January 22, 1993, filed a Cross Motion for Summary Judgment (#26) in which they seek this court's declaration that 25 U.S.C. § 2719(b)(1)(A) is constitutional or, in the alternative, that § 2719(b)(1)(A) must be severed in its entirety from IGRA.

Although the Siletz Tribes and the State agree no triable issues of fact exist and thus frame their respective requests for relief as motions for summary judgment, they actually seek declaratory relief. *See* Declaratory Judgments Act, 28 U.S.C. § 2201, *et seq* (1988). Declaratory relief is appropriate when "a judgment will clarify and settle the legal relations at issue and . . . will afford relief from the . . . controversy giving rise to the proceedings." *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992) (citing *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.), *cert. denied*, 385 U.S. 919 (1966). Declaratory relief rests within this court's discretion and may be exercised in the public interest. *Dexter v. Kirschner*, 972 F.2d 1113, 1116 (9th Cir. 1992). "A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones." *Natural Resources Defense Council, Inc.*, 966 F.2d at 1299. In the matter before me, the DOI's action is final and the issues are legal; therefore, I find the requests for declaratory relief made by the Siletz Tribes and the State are appropriate.

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[3] For convenience, the State of Oregon and Governor Roberts will be referred to hereinafter as "the State" except those times when a distinction is significant.

BACKGROUND

In March 1992, the Siletz Tribes approached the Siletz Agency, Bureau of Indian Affairs (BIA),[4] with a proposition to take into trust (i.e., to convert off-reservation land in fee to land in trust to be held by the United States for the benefit of the Siletz Tribes) a 16-acre tract in Salem, Oregon, located 50 miles from the reservation for the purpose of establishing and operating a $7 million casino pursuant to the provisions of 25 U.S.C. § 2719(b)(1)(A). The Siletz Agency requested comments on the proposal from Marion County and the City of Salem. On April 20, 1992, Governor Roberts submitted a Consultation Report to Manuel Lujan, Secretary of DOI (for convenience, "the Secretary" and "the DOI" will be used interchangeably), in which she stated she opposed the Siletz Tribes' proposition because it would not be in the interests of the City of Salem, the County of Marion, or the State of Oregon.

In June 1992, the Siletz Tribes submitted a formal application to the Siletz Agency. In July 1992, the Siletz Agency recommended approval of the Siletz Tribes' application and forwarded the proposal to the Portland Area Office. The Portland Area Office recommended approval and forwarded the proposal to the Central

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[4] The BIA has three administrative levels: the Agency Office, the Area Office, and the Central Office in Washington, D.C. According to the BIA, approximately 87 agency offices represent tribes or confederations of tribes; the Siletz Tribes are represented by the Siletz Agency.

Fee-to-trust requests are initially submitted to the Agency Office, processed through the Area Office, and finally approved or denied at the Central Office under the authority of the Secretary.

Office. In September 1992, the Central Office returned the application to the Portland Area Office for supplementation. Pursuant to the requirements of § 2719(b)(1)(A), the Siletz Agency Superintendent then requested Marion County, the City of Salem, the Governor, and local tribes to comment further as to whether the proposed off-reservation gaming operation would be in the best interests of the Siletz Tribes and whether such an operation would be detrimental to the surrounding community. In October 1992, the Governor responded directly to Dr. Eddie Brown, Assistant Secretary, BIA, and stated the proposed gaming operation would be detrimental to the surrounding community. In spite of the Governor's comments, the Portland Area Office again recommended approval and forwarded the application to the Central Office.

On November 6, 1992, the Secretary issued findings concluding the proposal was in the best interests of the Siletz Tribes and would not be detrimental to the community. The Secretary also addressed the comments and objections of the City of Salem, the County of Marion, the Governor on behalf of the State, and neighboring tribes. The Secretary then asked the Governor to concur with the DOI's determination in favor of granting the Siletz Tribes' application; the Governor refused. In December 1992, the DOI denied the Siletz Tribes' application because, in its opinion, an exception to § 2719(a) could not be granted without the Governor's concurrence.

ISSUES

1. Whether 25 U.S.C. § 2719(b)(1)(A) requires the DOI to obtain the Governor's concurrence before it can convert off-reservation land fee-to-trust for the purpose of establishing a gaming operation for the benefit of an Indian tribe.

2. If § 2719(b)(1)(2) requires the DOI to obtain the Governor's concurrence, whether that requirement is constitutional under the Appointments Clause (Article II, Section 8, Clause 17 of the United States Constitution), general separation-of-powers principles, the Fifth Amendment, and the Tenth Amendment.

3. If § 2719(b)(1)(2) unconstitutionally requires the Governor's concurrence, whether the provision requiring same is severable from § 2719(b)(1)(A).

DISCUSSION

The Siletz Tribes contend the DOI's denial of their application for an exception to § 2719(a) should be reversed and remanded for reconsideration because the decision was based on the DOI's erroneous conclusion that the Governor's concurrence is mandatory under § 2719(b)(1)(A). The Siletz Tribes assert the Governor's role is merely advisory. If this court determines that § 2719(b)(1)(A) dictates the DOI's decision is subject to the Governor's concurrence, the Siletz Tribes contend the offending portion of the statute violates the Appointments Clause, general separation-of-powers principles, the Fifth Amendment, and the Tenth Amendment and, therefore, must be excised.

Defendants ask this court to find the provision requiring the Governor's concurrence constitutional; if I find otherwise, however, the State asserts § 2719(b)(1)(A) must be severed in its entirety from IGRA.

At the heart of this action lie the following statutes:

25 U.S.C. § 2719(a) prohibits the establishment of gaming operations on off-reservation lands acquired in trust by the DOI for the benefit of an Indian tribe after October 17, 1988, except under certain conditions that are irrelevant to the particular issues brought to this court by the Siletz Tribes. 25 U.S.C. § 2719(b)(1)(A) provides the following exception to the prohibition of § 2719(a):

> (1) Subsection (a) of this section will not apply when –
>
> (A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. . . .

STATUTORY CONSTRUCTION

a. DOI's conduct.

The Siletz Tribes contend the DOI's conduct up to the time of its final decision indicates the DOI viewed the Governor's concurrence or nonconcurrence as merely advisory. The Siletz Tribes point out their application

received favorable findings at every administrative level: (1) after the Governor's initial rejection of the proposal, the Secretary issued findings concluding the proposal was in the best interests of the Siletz Tribes and not detrimental to the surrounding community; (2) high-level DOI officials stated the Governor's concurrence was not a prerequisite for approval (see affidavit of Kerry Barnett, ¶¶ 3-4); and, (3) the DOI tentatively approved the Siletz Tribes' application in the face of the Governor's objections.

Unfortunate as it may seem, the DOI's conduct does not determine statutory construction nor does it shed light on the question of a statute's constitutionality. The Siletz Tribes' reliance on the DOI's conduct to support their interpretation of § 2719(b)(1)(A) is ill-founded.[5]

b. Meaning of § 2719(b)(1)(A).

The Siletz Tribes argue § 2719(b)(1)(A) can and should be construed as giving the Governor no more than an advisory role while preserving the Secretary's ultimate authority over the decision whether to grant an exception to § 2719(a); therefore, the DOI's denial of the Siletz Tribes' application, which was based solely on the DOI's erroneous interpretation of the Governor's role, should be reversed and remanded for reconsideration under the correct application of the law.

Section 2719(b)(1)(A) mandates the sequence of steps required before an exception to § 2719(a) can be granted:

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[5] The Siletz Tribes do not claim they acted to their detriment in reliance on the DOI's conduct.

(1) the tribe must apply for an exception; (2) the Secretary must consult with the tribe, other local tribes, local officials, and state officials; (3) the Secretary must determine whether a gaming operation on the newly-acquired land would be in the best interests of the tribe and whether it would be detrimental to the surrounding community; and (4) if the Secretary's determination is favorable, the Secretary must obtain the Governor's concurrence before an exception can be granted. The statute permits an exception to the prohibition of § 2719(a) only if all steps are satisfied.

Oliver Wendell Holmes, Jr., once stated, "We do not inquire what the legislature meant; we ask only what the statute means." *Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). *See also Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 1149 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). Section 2719(b)(1)(A) permits the DOI to grant an exception to § 2719(a), "but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's [favorable] determination." The final step of obtaining the Governor's concurrence is an integral part of the process under § 2719(b)(1)(A); in fact, the "but only if" restrictive language precludes the Secretary from granting an exception to § 2719(a) without satisfying this final step. If the restrictive language were eradicated, the Governor's role would indisputably be advisory; the statute, however, makes no bones about the necessity of the Governor's concurrence.

I find the straightforward language of § 2719(b)(1)(A) leaves little room for misinterpretation.[6] When Congress's "will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, ___ U.S. ___, 113 S.Ct. 1119, 1122-23 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)). I find the language of § 2719(b)(1)(A) is unmistakably plain and, therefore, conclusive: If the Secretary cannot obtain the Governor's concurrence, the Secretary's determination in favor of granting an exception dies. I, therefore, hold that the Governor's concurrence is mandatory under § 2719(b)(1)(A) and that the Governor has, in effect, final authority over the grant of an exception to § 2719(a).

In light of the foregoing, an examination of secondary materials to determine Congress's intent is unnecessary. I note, however, Assistant Attorney General John R. Bolton's reaction to an earlier form of the law that eventually became § 2719(b)(1)(A). Mr. Bolton advised the senate committee that this section of IGRA would violate the Appointments Clause if it were dependent upon the

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[6] The argument that the unambiguous language of § 2719(b)(1)(A) means something other than its plain meaning is grounded in what I call the "Humpty Dumpty approach" to language: " 'There's glory for you!' 'I don't know what you mean by glory,' Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't – till I tell you. . . . ' 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.' " Lewis Carroll, *Through the Looking Glass* 198 (Julian Messner ed. 1978) (1871).

concurrence of the Governor, the state legislature, and/or the county or municipality in which such lands were located. S. Rep. No. 446, 100th Cong., 2d Sess. 32 (1988), *reprinted in* 19 U.S.C.C.A.N. 3071, 3102. To avoid the inherent constitutional problems that would crop up if individuals who were not appointed in accordance with the Appointments Clause were permitted to waive a federal statute, Mr. Bolton recommended Congress include language that clearly indicated the DOI would have ultimate authority to grant an exception. Mr. Bolton specifically suggested the provision begin with the words "Subject to the approval of the Secretary." *Id.* If Congress had heeded Mr. Bolton's counsel and crafted an exception in which the DOI clearly had final authority to grant or to deny an exception to § 2719(a), we might not be here today.

c. Compatibility of §§ 2719(b) and (c).

The Siletz Tribes further argue §§ 2719(b) and (c) taken together are ambiguous and should, therefore, be liberally construed in favor of the Siletz Tribes.

"[A]mbiguities in federal statutes dealing with Indians are to be resolved favorably to the Indians." *United States v. Ferry County*, 511 F.Supp. 546, 550 (E.D.Wash. 1981) (citing to *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977)).[7] The court in *Ferry County* noted,

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[7] The Siletz Tribes also turn to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to support their argument that § 2719(b)(1)(A) must be liberally construed in their favor. In

however, this liberal construction "does not require a strained reading of the statute." 511 F.Supp. at 550.

Section 2719(c) provides "[n]othing in this section shall affect or diminish the authority of the Secretary to take land into trust." The Siletz Tribes contend § 2719(c) clearly confers ultimate authority to the Secretary to grant the exception provided for in § 2719(b)(1)(A).[8] I disagree. Section 2719(b)(1)(A) gives the Secretary authority, subject to the Governor's concurrence, to take off-reservation land into trust for the specific purpose of establishing a gaming operation for the benefit of an Indian tribe. Section 2719(c) merely ensures that the Secretary's general authority to take off-reservation land into trust for the benefit of an Indian tribe remains undiminished.[9] In light of the foregoing, I find §§ 2719(b) and (c) are neither ambiguous nor incompatible.

Cabazon, however, the Supreme Court addressed the enforceability of state laws on Indian reservations in light of competing state, federal, and tribal interests. Here I do not have the task of determining which sovereignty has the most compelling interest.

[8] The Siletz Tribes alternatively challenge § 2719(b)(1)(A) on the ground that requiring the State's approval to the conversion of land in fee to land in trust for the purpose of establishing a gaming operation for the benefit of an Indian tribe amounts to an unconstitutional limitation on preexisting sovereign tribal authority over trust lands; however, I find my analysis of the meaning and constitutionality of the statute does not require me to reach this issue.

[9] No party argues that establishment of a gaming operation is the only reason to convert off-reservation land from fee to trust for the benefit of an Indian tribe.

TENTH AMENDMENT

If the Governor's concurrence is viewed as mandatory, the Siletz Tribes further contend such a requirement would, in effect, "command" the Governor to participate in a federal decision in violation of the Tenth Amendment. *See New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408, 2435 (1992) ("Federal Government may not compel the States to enact or administer a federal regulatory program"). *See also Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993).

The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In *Board of Natural Resources*, the Ninth Circuit addressed the limitations imposed on Congress by the Tenth Amendment and held unconstitutional a statute requiring the State of Washington to issue regulations to carry out a federal ban on the export of logs from public lands. *Id.* at 946-47. Although Congress has the authority "to pass laws requiring or prohibiting certain acts," the court pointed out that the Tenth Amendment limits "Congress's power to use the states as implements of regulation" and prohibits Congress from directly compelling " 'the States to require or prohibit those acts' " or " 'to enact and enforce a federal regulatory program.' " *Id.* (quoting *New York v. United States*, 112 S.Ct. at 2420-23). The Tenth Amendment, in effect, prohibits the federal government from infringing on the States, legislative power except as otherwise constitutionally permitted.

Section 2719(b)(1)(A) demands nothing of the Governor; all of the burdens imposed by the statute rest with the DOI. The Governor, in fact, independently exerts power on behalf of the State even through inaction: The Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application for an exception to § 2719(a). Section 2719(b)(1)(A) does not infringe on the State's legislative power; therefore, I do not find merit in the Siletz Tribes' Tenth Amendment argument.

APPOINTMENTS CLAUSE AND SEPARATION OF POWERS

If the Governor's concurrence is mandatory, the Siletz Tribes further assert the statutory requirement is unconstitutional and violates the Appointments Clause[10] and general separation-of-powers principles. Defendants argue § 2719(b)(1)(A) does not violate the Appointments Clause because the Governor is not an appointee as

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[10] The pertinent part of the Appointments Clause, Article II, Section 8, Clause 17 of the United States Constitution, provides:

> . . . . He [the President] shall . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

defined under *Buckley v. Valeo,* 424 U.S. 1 (1976). Defendants further contend the requirement of the Governor's concurrence does not breach separation-of-powers principles.

Appointments Clause

Defendants argue the Appointments Clause does not apply to § 2719(b)(1)(A) because the Governor does not qualify as a federal appointee under the *Buckley* test. Under *Buckley,* the Appointments Clause applies to (1) all executive or administrative officers, (2) who serve pursuant to federal law, and (3) who exercise significant authority over federal government actions. 424 U.S. at 123-27. *See also Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power,* 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied,* 479 U.S. 1059 (1987).[11] In *Buckley,* the Supreme Court found "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of

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[11] Although the parties cite to *Seattle Master Builders Ass'n,* each for their own purposes, the issues differ from those brought before this court. In *Seattle Master Builders Ass'n,* a group of home builders asserted the authority granted by Congress to the Pacific Northwest Electric Power and Conservation Council was unconstitutional and violated the Appointments Clause because the council exercised "significant authority over the federal government" even though members were not appointed by the President. 786 F.2d at 1362-63. The Ninth Circuit concluded the Appointments Clause was not violated. The court reasoned that council members were not officers of the United States within the meaning of *Buckley* because members performed their duties pursuant to the Interstate Compact Clause requiring both state legislation and congressional approval. *Id.*

the United States,' and must, therefore, be appointed" in the manner prescribed by the Appointments Clause. 424 U.S. at 126.

Under § 2719(b)(1)(A), the Governor was not appointed by the Executive Branch nor was the Governor an inferior federal officer properly appointed by Congress "to carry out appropriate legislative functions." *Buckley*, 424 U.S. at 128. As explained more fully in the separation-of-powers section below, however, Congress, in effect, unconstitutionally empowered the Governor to act as if she were an officer of the United States appropriately appointed by Congress to "serve" pursuant to federal statute and to exercise significant authority over federal government actions through a congressional grant of power.

Separation of Powers

Defendants also argue the doctrine of separation of powers as reflected in the Appointments Clause only forbids Congress to retain or to enlarge its power over executive authority. Defendants conclude, therefore, the Siletz Tribes, contention that § 2719(b)(1)(A) violates the Appointments Clause is erroneous because the statute does not enlarge Congress's power. Defendants also argue the requirement of the Governor's concurrence equates to "contingent" legislation[12] rather than veto

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[12] "Contingent" legislation refers to statutes that initially take effect or are implemented by the action of individuals or entities outside the federal government. *See, e.g., Currin v. Wallace*, 306 U.S. 1 (1939).

power over the Secretary's determination; therefore, defendants contend § 2719(b)(1)(A) does not violate general separation-of-powers principles.

General separation-of-powers principles are exemplified in the delegation and separation of powers inherent in the structure of Articles I, II (which includes the Appointments Clause), and III. *INS v. Chadha*, 462 U.S. 919, 946 (1983). The Appointments Clause specifically addresses separation of powers between Congress and the Executive Branch. *See Buckley*, 424 U.S. at 124-32. The core concern of the Appointments Clause is to ensure that executive power remains independent. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 722-27 (1986) (Congress may not encroach on the authority of the Executive Branch by exercising removal power over an officer performing Executive Branch functions). In *Mistretta v. United States*, the Supreme Court noted efforts to contain "encroachment and aggrandizement" by a single Branch has animated the Court's separation-of-powers jurisprudence. 488 U.S. 361, 382 (1989). The Court further observed that it has "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches *or that undermine the authority and independence of one or another coordinate Branch.*" *Id.* (Emphasis added). *See also United States v. The Boeing Co.*, ___ F.3d ___, No. 92-36660, slip op. 12825, 12839-41 (9th Cir. Nov. 5, 1993).[13]

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[13] The ever-cautious reader should be aware that *Boeing* was initially filed September 7, 1993, and radically amended (omission of 3+ pages) less than two months later. ___ F.3d ___, No. 92-36660, slip op. 9633 (9th Cir. Sep. 7, 1993).

In *Chadha*, the Supreme Court demonstrated its concern for the independence of the Executive Branch when it carefully constrained Congress's efforts to usurp executive power. Congress had given itself a one-house legislative veto over deportation decisions made by the United States Attorney General. The Supreme Court held the one-house legislative-veto portion of the statute unconstitutional and pointed out that neither the House of Representatives nor the Senate unilaterally had the power to require "the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority" made a determination. 462 U.S. at 952-53. In delegating to one house the power to veto a decision of the Executive Branch, Congress was delegating power that one house could not constitutionally exercise. *Id.* Similarly, the Siletz Tribes argue Congress delegated power to the Governor that a state official could not constitutionally exercise and, in doing so, undermined the authority and independence of the Executive Branch. Defendants respond that the requirement of the Governor's concurrence is not extraordinary or unconstitutional as illustrated by the fact that (1) Congress has frequently delegated power to the states to approve legislation as a condition precedent to operation or implementation of a statute, (2) the Supreme Court on several occasions has sustained congressional enactments subjecting federal agencies to the operation of state law and determinations of state administrative agencies, and (3) the federal government has agreed in the past to submit to state law in several areas. *See, e.g., Currin v. Wallace*, 306 U.S. 1 (1939) (the Secretary of Agriculture can only designate markets for the auction of tobacco that

have been approved by a referendum of two-thirds of tobacco growers); *California v. United States*, 438 U.S. 645 (1978) (federal dam subject to regulation by state water resources agency); *Hancock v. Train*, 426 U.S. 167 (1976) (federal facility subject to state air pollution regulations); *FERC v. Mississippi*, 456 U.S. 742 (1982) (state utility commission administered federal regulations regarding utility rate structures and cogeneration). Unlike Congress's mandate in § 2719(b)(1)(A), however, these cases generally involve (1) state agencies or appointees administering state regulatory programs based on state law that governs the legal rights and obligations of state residents, (2) interstate compacts that affect the federal sphere, or (3) joint federal and state action. *See Seattle Master Builders Ass'n*, 786 F.2d at 1362-65.

Here we are not faced with a requirement that a federal agency follow the laws, regulations, and policies set by a state, *see, e.g., Hancock v. Train*, 426 U.S. 167 (1976); we are not faced with legislation that permits states to appoint council members to regulate activities under a compact between federal and state governments, *See, e.g., Seattle Master Builders Ass'n;* we are not faced with legislation that might constitutionally permit a state to act as an agent under the Appointments Clause, *see United States, ex. rel. Truong v. Northrop Corp.*, 728 F.Supp. 615, 623 (C.D.Cal. 1989); and we are not faced with "contingent legislation" that initially takes effect or is implemented by the action of individuals or entities outside the federal government, *see Currin v. Wallace*, 306 U.S. 1 (1939). Instead we have a statute in which Congress delegates to a state official the power to veto a favorable determination by an official of the Executive Branch who

was legislatively charged with making that determination. In other words, we have "an act of Congress [that] arguably threatens the integrity of another branch's authority and independence" and impermissibly undermines the role of that branch. *United States v. The Boeing Co.*, No. 92-36660, slip op. at 12840 (citing *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 856 (1986)).

In *United States v. Ferry County*, the district court also confronted issues under the Appointments Clause arising from a statute that required the consent of local authorities to federal action. In § 2 of the Colville Restoration Act of 1956 (Act) (PL 84-772, 70 Stat. 626), the Secretary was authorized to acquire non-Indian lands for the benefit of Indian tribes but only after obtaining consent from the commissioners of counties in which the land was located. The legislative rationale for first obtaining the county commissioners' consent was that the acquisitions of non-Indian land for the benefit of Indian tribes would remove that land from the county tax rolls. 511 F.Supp. at 551. The district court held the consent provision did not violate general principles of separation of powers nor, specifically, the Appointments Clause because the statute was inoperative unless the commissioners first passed a resolution consenting to the acquisitions. *Id.* at 550-52. In the Act, Congress imposed no prerequisites or standards to be met by the DOI before purchasing non-Indian lands nor was the DOI charged with a legislative directive to make a determination that could be overruled by the county commissioners, *see id.* at 550; in fact, the DOI was a passive participant in the statutory scheme.

In contrast, § 2719(b)(1)(A) delineates in detail the conduct and procedure the DOI must follow when a tribe applies for an exception to § 2719(a). The statutory prerequisites require the DOI to consider the views of state and local interests. The Governor's concurrence or nonconcurrence does not trigger operation of § 2719(b)(1)(A) nor does it initiate the DOI's consideration of the legislatively-mandated factors that are required before the DOI can grant an exception. Instead § 2719(b)(1)(A) requires a discretionary administrative determination by the DOI that includes consideration of the Governor's views and then grants the Governor the power to negate the DOI's determination if it is favorable.

I find no authority that holds Congress can delegate to a state official the power to nullify a determination by a federal agency legislatively charged with making that determination. In fact, a principal purpose of the Constitution was to eliminate a fundamental weakness in the Articles of Confederation that required the Confederacy to obtain the states' consent for every important federal action. *Federalist Papers No. 15* (Hamilton). The framers of the Constitution, in their wisdom, perceived there would have been little prospect of federal measures being executed if the federal government could not "carry its agency to the persons of the citizens" without the "intermediate" assent of the states. *Federalist Papers No. 16* (Hamilton).

In § 2719(b)(1)(A), Congress did not directly arrogate to itself a power that would otherwise be exercised by the Executive Branch; Congress, however, encroached upon and undermined the authority of the Executive Branch when it required the DOI to make a determination under

certain circumstances, set the standards for the DOI's determination (to include consideration of the Governor's views), and then enfranchised the Governor with the power to kill the DOI's determination if it were favorable. Congress unconstitutionally delegated to a state official, who was not a properly appointed federal officer as defined by *Buckley*, the power to overrule a determination that would otherwise have been exercised solely by an agency of the Executive Branch, power that an individual house of Congress could not unilaterally exercise, *see Chadha*, 462 U.S. at 952-53, and power that a state official could not constitutionally exercise.[14]

In summary, I find Congress violated the Appointments Clause and general separation-of-powers principles when it granted a state governor veto power over a discretionary determination made by an agency of the Executive Branch legislatively charged with making that determination; therefore, the provision of § 2719(b)(1)(A) that grants veto power to the Governor is unconstitutional.

FIFTH AMENDMENT

If the Governor's concurrence is determined to be mandatory, the Siletz Tribes also argue that § 2719(b)(1)(A) violates the Siletz Tribes, due process rights under the Fifth Amendment because the statute (1)

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[14] Congress may be able to delegate its power to an independent agent, *see Bowsher*, 478 U.S. at 753; however, I find no authority that permits Congress to grant an independent agent veto power over a determination made by an agency of the Executive Branch.

delegates Executive authority to a state governor in spite of the State's inherent conflict of economic interest and (2) fails to provide a process for challenging the governor's decision. Since I have found § 2719(b)(1)(A) unconstitutional on other grounds, I find it unnecessary to reach the Siletz Tribes' Fifth Amendment argument.[15]

SEVERABILITY

Finally, the Siletz Tribes argue that even if the provision requiring the Governor's concurrence is unconstitutional, the remedy is to sever that provision and to permit the constitutional portion of the statute to operate as law; the State, in turn, contends the remedy is to sever § 2719(b)(1)(A) in its entirety.

Section 2721 of IGRA provides:

> In the event that any section or provision of this chapter . . . is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter . . . shall continue in full force and effect.

The presence of a severability clause creates a presumption that "the objectionable provision can be excised from the remainder of the statute" unless strong evidence indicates Congress intended otherwise. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The two-part test is (1) whether the statute would be "functionally independent"

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[15] The parties have indicated an appeal will follow regardless of the outcome; therefore, none of the parties' arguments are, in reality, foreclosed since the appellate court will review the record *de novo*.

after excision of the unconstitutional provision and (2) whether the surviving portion of the statute would function independently in a manner consistent with the intent of Congress. *Board of Natural Resources*, 992 F.2d at 948.

a. Whether the surviving portion of the statute would function independently after excision.

If elimination of the unconstitutional portion of an act "in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation," the act is "functionally independent." *Id.* (citing *United States v. Jackson*, 390 U.S. 570, 586 (1968)). A statute is, in other words, functional if the court does not have to rewrite the law to allow it to operate independently. *Alaska Airlines, Inc.*, 480 U.S. at 684.

I find neither IGRA nor § 2719 would be substantively altered by excision of the unconstitutional portion of § 2719(b)(1)(A). I also find elimination of the unconstitutional portion of § 2719(b)(1)(A) would not substantively affect the functional independence of the constitutional portion. In other words, the constitutional portion of § 2719(b)(1)(A) could continue to operate effectively as an exception to the prohibition of § 2719(a): The Secretary would still be required to consult with the tribe, appropriate state and local officials, and other local tribes before determining whether fee-to-trust conversion of off-reservation lands for the purpose of establishing a gaming operation was in the tribe's best interests and would not be detrimental to the surrounding community.

b. Whether the surviving portion of the statute would function independently in a manner consistent with the intent of Congress.

As Governor Roberts pointed out in her letter to the DOI dated April 20, 1992, § 2719(b)(1)(A) reflects Congress's intention to ensure "state public policy play[s] a . . . critical role in determining whether new lands [i.e., off-reservation land] should be acquired for gambling purposes." Courts have acknowledged state interests are of greater weight when the circumstances involve tribal activities conducted outside the reservation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). *See also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

Section 2719(a) clearly sets forth a general federal policy of prohibiting fee-to-trust conversions of off-reservation land for the purpose of establishing gaming operations for the benefit of Indian tribes. In § 2719(b)(1)(A), Congress tempered the absolute nature of its prohibition by giving the DOI authority to consider exceptions and by dictating a procedure the DOI must follow when considering such exceptions. By directing the Secretary to first consult with appropriate state and local officials and by requiring the Secretary to determine whether an off-reservation gaming operation would be detrimental to the surrounding community, Congress ensured state public policy together with other local interests would be an important part of the equation. Congress went a step further, however, and granted the Governor veto power over a favorable determination by the Secretary.

Although § 2719(b)(1)(A) could have been written many ways, the statute before me is the statute Congress enacted. I do not intend to second guess Congress's

intentions beyond those expressed in the statute nor do I intend to speculate as to "what might have been" if the statutory language were shifted slightly.[16] As stated earlier, the meaning of § 2719(b)(1)(A) is unmistakably clear: Congress made the state's interests paramount by granting the Governor veto power over the DOI's determination. Absent the unconstitutional portion of § 2719(b)(1)(A), the DOI would still be required to consider the views of local tribes and state and local officials; however, the DOI could reject those views. In effect, if only the constitutional portion of the statute were preserved, the state's interest would no longer be paramount as Congress apparently intended. Accordingly, I conclude mere excision of the unconstitutional provision present in § 2719(b)(1)(A) would not satisfy the two-part test set

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[16] The difference between the language used and the writer's intended meaning may seem like a mere matter of semantics; however, as Mark Twain pointed out, "the difference between the *almost right* word[s] and the *right* word[s] is really a large matter – 'tis the difference between the lightning-bug and the lightning." Letter from Mark Twain to George Bainton (Oct. 15, 1888), *in The Art of Authorship* at 87-88 (George Bainton ed.) (1890).

Lest anyone remain perplexed as to how Congress could have carved an exception to § 2719(a) that would have eluded constitutional problems while retaining the prominence of state interests, I offer the following possibilities: (1) Congress could have structured an exception that was triggered by approval of the Governor, the state legislature, other local tribes, and the city and county in which the land was located but subject to final approval by the DOI; or (2) Congress could have required the Governor's approval after consideration of comments from the state legislature, other local tribes, and the city and county in which the land was located subject to final approval by the DOI.

forth in *Board of Natural Resources* because the surviving portion of the statute would not function independently in a manner consistent with the apparent intent of Congress. I, therefore, hold § 2719(b)(1)(A) must be severed in its entirety from IGRA.

CONCLUSION

Based on the foregoing, I find § 2719(b)(1)(A) violates the Appointments Clause and general separation-of-powers principles because it unconstitutionally grants a state official veto power over a determination made by an agency of the Executive Branch legislatively charged with making such a determination. I also find the constitutional portion of § 2719(b)(1)(A) would not function independently in a manner consistent with the apparent intent of Congress and, therefore, § 2719(b)(1)(A) must be severed in its entirety from IGRA. Accordingly, the motions for summary judgment filed by the Siletz Tribes and the State are PARTIALLY GRANTED and PARTIALLY DENIED; the Siletz Tribes' request for reversal and remand of the DOI's decision is DENIED.

IT IS SO ORDERED.

DATED this 21st day of January, 1994.

/s/ James M. Burns
UNITED STATES SENIOR
DISTRICT JUDGE

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FILED

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CLERK

No. 97-449

In the Supreme Court of the United States

OCTOBER TERM, 1997

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, generally prohibits gaming regulated by the Act on off-reservation lands that are newly acquired by the Secretary of the Interior in trust for Indian tribes. An exception to that general bar exists, however, where (1) the Secretary determines that gaming on the lands would be in the best interest of a Tribe and its members and would not be detrimental to the surrounding community, and (2) "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A). This case presents the following questions:

1. Whether Section 2719, by requiring the Governor's concurrence as a precondition to the acquisition of trust land for specified off-reservation gaming activities, impinges upon the constitutional prerogatives of the States.

2. Whether Section 2719 unconstitutionally diminishes the President's power to execute the laws of the United States, or impermissibly delegates a federal policy decision to a state official.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 110 F.3d 688. The opinion of the district court (Pet. App. 30-57) is reported at 841 F. Supp. 1479.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1997, and was amended on June 13, 1997, in an order that also denied a petition for rehearing. Pet. App. 6-8. The petition for a writ of certiorari was filed on September 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to provide a statutory basis for the operation and regulation of gaming by Indian Tribes. See 25 U.S.C. 2702(1) and (2). Section 20(a) of IGRA, 25 U.S.C. 2719(a), establishes a general rule that "gaming regulated by this chapter shall not be conducted on [off-reservation] lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe" after October 17, 1988 (the effective date of IGRA).[1] Section 20(b), 25 U.S.C. 2719(b), establishes exceptions to that rule. The exception at issue in this case provides that the general prohibition shall not apply where

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. 2719(b)(1)(A).

2. In March 1992, petitioner Confederated Tribes of Siletz Indians of Oregon requested that the Bureau of Indian Affairs (BIA) acquire a 16-acre parcel

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[1] The Secretary of the Interior is generally authorized to acquire lands or interests in lands "within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 465. See also 25 C.F.R. 151.3(a) (governing acquisition of lands in trust for Indians).

located in Salem, Oregon, in trust for the Tribes for purposes of operating a casino. The parcel lies approximately 50 miles from petitioner's reservation. In June 1992, petitioner submitted a formal application to have the land taken in trust. The BIA requested comments on the Tribes' application from the State, county, city, and nearby Indian Tribes. The Secretary of the Interior subsequently determined that the proposed acquisition was in the best interest of the Tribes and that the acquisition would not be detrimental to the surrounding community. The Governor, however, refused to concur in the Secretary's determination and submitted objections to the proposal. On December 21, 1992, the Secretary denied petitioner's application on the ground that, absent the Governor's concurrence, the exception established by Section 2719(b)(1)(A) did not apply and Section 2719(a) precluded acquisition of the land for purposes of gaming. The Secretary noted that the land could be acquired in trust for non-gaming purposes if petitioner were to reapply. Pet. App. 11-12, 34-35.

3. Petitioner filed suit in federal district court against the United States and officials of the Department of the Interior. Petitioner sought a declaration that the gubernatorial concurrence requirement of Section 2719(b)(1)(A) is unconstitutional, and a remand of the Tribe's application to the Secretary for reconsideration in light of the requested declaration. The State of Oregon and its Governor were permitted to intervene as defendants. The State sought a declaration that the gubernatorial concurrence provision is constitutional, or, in the alternative, a declaration that Section 2719(b)(1)(A) must be invalidated in its

entirety, with the result that gaming could never be conducted on newly acquired lands. Pet. App. 32-33.

The district court denied petitioner's request for reversal and remand of the Secretary's decision and dismissed the suit. Pet. App. 28-57. The court agreed with petitioner that the gubernatorial concurrence requirement was invalid, stating that "Congress violated the Appointments Clause and general separation-of-powers principles when it granted a state governor veto power over a discretionary determination made by an agency of the Executive Branch legislatively charged with making that determination." *Id.* at 52.[2] The court concluded, however, that the remainder of Section 2719(b)(1)(A) could not function independently of the concurrence provision in a manner consistent with congressional intent.[3] The court therefore held that Section 2719(b)(1)(A)

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[2] The district court rejected petitioner's argument that the concurrence provision commanded the Governor to participate in a federal decision in violation of the Tenth Amendment. Pet. App. 43-44. The court noted that the provision "demands nothing of the Governor; all of the burdens imposed by the statute rest with the DOI. The Governor, in fact, independently exerts power on behalf of the State even through inaction: The Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application." *Id.* at 44.

[3] The court reasoned that in enacting Section 2719(b)(1)(A), "Congress made the state's interests paramount by granting the Governor veto power over the DOI's determination." Pet. App. 56. The court concluded that "if only the constitutional portion of the statute were preserved"—*i.e.*, if the Secretary were permitted to acquire off-reservation lands in trust for the purpose of gaming even in the face of the Governor's objection—"the state's interest would no longer be paramount as Congress apparently intended." *Ibid.*

had to be struck down in its entirety. Pet. App. 55-57. The court accordingly denied petitioner's request for reversal and remand of the Secretary's decision, since, without Section 2719(b)(1)(A), the Secretary was barred by Section 2719(a) from acquiring off-reservation lands for purposes of gaming. See Pet. App. 12-13.

All parties appealed. The court of appeals affirmed the district court's dismissal of the suit, albeit on grounds different from those on which the district court had relied. Pet. App. 1-27. Consistent with the position of the State and the Secretary, the court held that Section 2719(b)(1)(A) does not violate either the Appointments Clause or separation-of-powers principles, and it therefore sustained the Secretary's denial of petitioner's application. See Pet. App. 10.

The court first considered the application of general principles of separation of powers. The court observed that "[c]ontingent legislation"—*i.e.*, legislation whose effectiveness is made to depend upon the occurrence of a condition precedent, such as approval by some person or persons outside the federal government—"is constitutionally acceptable in many forms." Pet. App. 17. "By placing a condition upon when and under what circumstances a provision of a statute goes into effect," the court explained, "Congress does not infringe upon the Executive's ability to execute that statute." *Id.* at 18. In a variety of circumstances, the court noted, Congress has provided that legislation will become effective only upon the occurrence of a specified contingency. *Id.* at 18-19. Those statutes include, *inter alia*, "statutes requiring approval by state courts, state legislatures, and, as in this case, state governors." *Id.* at 19. The court concluded that Congress had acted within

its proper sphere in "plac[ing] restrictions on the Executive's ability to choose which land is to be taken into trust for gaming purposes," and that the gubernatorial concurrence requirement therefore did not violate separation-of-powers principles. *Id.* at 20-21.

The court also held that the concurrence provision does not violate the Appointments Clause. The court explained that the Governor is not a federal officer and does not exercise significant federal authority. Pet. App. 22-23. Rather, the Governor acts under authority of state law, and does so only on an episodic basis. *Id.* at 23-24. The federal interest is protected by the Secretary, an Officer of the United States appointed in conformity with the Appointments Clause. *Id.* at 24. Because the court sustained the gubernatorial concurrence provision against petitioner's constitutional challenge, it did not reach the question whether that provision is severable from the remainder of the IGRA. *Id.* at 27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7-12) that Section 2719(b)(1)(A) violates the Tenth Amendment by requiring state officials to assist in the administration of federal law. Petitioner's Tenth Amendment claim was rejected by the district court, on the ground that the gubernatorial concurrence provision does not compel States to enact or enforce a federal regulatory program, but simply gives States an opportunity to concur in a federal action that may have strong local

impacts. Pet. App. 43-44. Petitioner did not advance the Tenth Amendment claim in the court of appeals,[4] and that court did not address the issue. Because petitioner's claim was neither pressed nor passed on in the court of appeals, this Court should not consider it. See *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5]

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[4] Petitioner's court of appeals brief did observe that "[u]nder the Tenth Amendment, Congress cannot compel States to regulate on the federal government's behalf." Pet. C.A. Answering/Reply Br. 33. Petitioner also asserted that "[t]he Governor cannot refuse to exercise her *federal* authority under the statute; [if] she refuses to participate in the process on Tenth Amendment grounds, Section [2719] violates that amendment." *Id.* at 34. Those assertions were made, however, as part of petitioner's argument that Section 2719(b)(1)(A) unconstitutionally vested federal authority in state officials. Petitioner did not contend that Section 2719(b)(1)(A) violated the Tenth Amendment or impinged upon the constitutional prerogatives of the States.

[5] Petitioner is, moreover, an inappropriate representative of the State's interests in this matter. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976) (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 255, (1953)). Here, petitioner seeks to vindicate the rights of the State of Oregon to be free of a purported infringement of its sovereign prerogatives. The State, however, has maintained throughout this litigation that the gubernatorial concurrence provision is valid. Petitioner, whose interests are adverse to those of the State, is not the "proper proponent[] of the particular legal rights on which [it] bases [its] suit." *Singleton*, 428 U.S. at 112. Courts "should prefer to construe legal rights only when the most effective advocates of those rights are before them," *id.* at 114, which in this case would be the State itself. Compare *Printz* v. *United States*, 117 S. Ct. 2365, 2369

In any event, Section 2719(b)(1)(A) does not infringe on any constitutional prerogative of the States. Under this Court's Tenth Amendment jurisprudence, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz* v. *United States*, 117 S. Ct. 2365, 2383 (1997) (quoting *New York* v. *United States*, 505 U.S. 144, 188 (1992)). In a variety of circumstances, however, this Court has sustained Acts of Congress that make the applicability of federal law contingent upon the content of state law or the decisions of state officials. See, *e.g.*, *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421 (1993) (upholding "federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery"); *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (upholding statute under which the federal government's provision of highway funds was made contingent on a State's prohibition of alcohol sales to persons under age 21); *Parker* v. *Richard*, 250 U.S. 235, 238-239 (1919) (upholding provision that conditioned the conveyance of certain Indian lands upon the approval of a state court); cf. *United States* v. *Sharpnack*, 355 U.S. 286, 294-296 (1958) (discussing with apparent approval various statutory provisions making the scope or effectiveness of federal law contingent upon the content of state law); *North*

(1997) (suit filed by county law enforcement officers challenging federal statute that imposed administrative responsibilities upon them). While it may be difficult to imagine circumstances under which the State or its officials would file such a suit, that unlikelihood simply underscores the fact that Section 2719(b)(1)(A) imposes no obligations upon the Governor.

Dakota v. *United States*, 460 U.S. 300, 310-316 (1983) (construing with apparent approval federal statute that makes United States' acquisition of wetlands for waterfowl production contingent upon the consent of the State's Governor). So long as "the residents of the State retain the ultimate decision," *New York*, 505 U.S. at 168, regarding the manner in which state officials will perform their functions, the potential impact of the State's decision on the administration of federal law or the conduct of federal officers cannot be said to constitute an impingement on state sovereignty.

As the district court recognized (Pet. App. 43-44), Section 2719(b)(1)(A)'s gubernatorial concurrence provision is fully consistent with established Tenth Amendment jurisprudence. Section 2719(b)(1)(A) does not require state officials to do *anything*—it simply makes the Secretary's authority to perform specified actions contingent upon the Governor's determination that those actions are in the interest of the Tribe and the surrounding community.[6] Far from

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[6] Petitioner contends (Pet. 21) that "[t]here is a total absence of state legal authority for the Governor's participation in this federal regulatory scheme," and suggests (Pet. 22) that Section 2719(b)(1)(A) could have the effect of "requir[ing] a Governor to act beyond her constitutional or statutory authority." That claim was neither pressed nor passed on in the court of appeals and is therefore not appropriate for consideration here. In any event, the claim is without merit. If state law prohibits a Governor from concurring in a proposal for off-reservation gaming, nothing in the federal statute purports to require her to disregard that prohibition. The practical effect of such a state-law rule would be to foreclose the acquisition of off-reservation trust land for gaming within the State, but the Governor's refusal to give her concurrence

undermining the "[p]reservation of the States as independent political entities," *Printz*, 117 S. Ct. at 2377, the gubernatorial concurrence provision of Section 2719(b)(1)(A) protects state prerogatives in an area where Congress recognized that States retain significant interests. See S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988) ("[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens").

2. As the court of appeals correctly held, Congress does not infringe upon presidential authority when it "places restrictions on the Executive's ability to choose which land is to be taken into trust for gaming purposes." Pet. App. 20-21. Among the conditions that Congress may permissibly impose is the requirement that Executive Branch officials obtain the consent of some person or entity outside the federal government. See pp. 8-9, *supra* (citing cases); *Currin*

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would not place her in violation of Section 2719(b)(1)(A) or any other federal law.

In the instant case, the Governor of Oregon submitted written objections to the proposed acquisition of trust land for off-reservation gaming. See Pet. App. 34-35. Nothing in Section 2719, however, requires the Governor to express any view whatever regarding a proposed acquisition. Because the Secretary is authorized to acquire off-reservation trust land for gaming "only if the Governor of the State * * * concurs," 25 U.S.C. 2719(b)(1)(A), the acquisition cannot take place if the Governor declines to address the matter. See Pet. App. 44 (district court observes that "[t]he Governor, by doing nothing, can defeat the DOI's determination in favor of granting a tribe's application for an exception to § 2719(a).").

v. *Wallace*, 306 U.S. 1, 6 (1939) (upholding provision making Secretary of Agriculture's designation of tobacco market contingent on approval by two-thirds of growers); *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 577-578 (1939) (upholding provision making Secretary of Agriculture's ability to issue marketing orders contingent upon vote of producers); cf. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 407 (1928) (Congress may make the effectiveness of federal legislation contingent upon a vote of residents in the affected district; such a provision does not constitute an impermissible delegation of legislative power) (quoted at Pet. App. 16-17). Moreover, the fact that the Governor's participation in this scheme is voluntary rather than coerced "reduces the ability of Congress to use this device as a means of reducing the power of the Presidency." *Printz*, 117 S. Ct. at 2378 n.12.[7]

3. Petitioner also suggests (Pet. 17-21) that Section 2719(b)(1)(A) may violate the nondelegation doc-

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[7] As petitioner points out (Pet. 15-16), the court of appeals was incorrect in stating that "[t]he power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power." Pet. App. 20. Rather, the authority to determine whether acquisition of a particular tract "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," 25 U.S.C. 2719(b)(1)(A), is a garden variety example of executive power. Absent any conflict in authority as to the constitutionality of Section 2719(b)(1)(A), however, the court of appeals' inaccurate characterization of the Secretary's power presents no legal issue warranting this Court's review. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (the Court "reviews judgments, not statements in opinions") (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). Petitioner does not contend that such a conflict exists.

trine. Petitioner concedes (Pet. 18) that Section 2719(b)(1)(A) sets out an "intelligible principle" to guide the exercise of delegated authority, but argues that the Governor's decision may not be subject to judicial review. The question whether the Governor's decision may be subject to review in state court, while raised in the district court, was not ruled upon by that court (see Pet. App. 53) and was neither pressed nor passed on in the court of appeals. In any event, this Court's decisions upholding contingent legislation (see pp. 8-9, *supra*) have not suggested that the particular local approval must be judicially reviewable in order for the legislation to satisfy constitutional requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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